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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

BRANDYWINE COMMUNICATIONS
TECHNOLOGIES, LLC

Plaintiff,

v.

TOSHIBA CORPORATION and
TOSHIBA AMERICA INFORMATION
SYSTEMS, INC.

Defendants.

Case No: 2:12-cv-03211-JAK-(AJWx)

**PROTECTIVE ORDER
EXCLUDING PROSECUTION BAR
PROVISIONS IN PARAGRAPH 24**

1 To expedite the flow of discovery material, to facilitate the prompt
2 resolution of disputes over confidentiality of discovery materials, to adequately
3 protect information the parties are entitled to keep confidential, to ensure that only
4 materials the parties are entitled to keep confidential are subject to such treatment,
5 and to ensure that the parties are permitted reasonably necessary uses of such
6 materials in preparation for and in the conduct of trial, pursuant to Fed. R. Civ. P.
7 26(c), it is hereby **ORDERED THAT:**

8 **A. Definitions**

9 1. “Party”: any party to this action, including all of its officers, directors,
10 employees, consultants, retained experts, and outside counsel (and their support
11 staff).

12 2. “Material”: all information, documents, testimony, and things
13 produced, served or otherwise provided in this action by the Parties or by non-
14 parties.

15 3. “Designating Party”: a Party or non-party that designates information,
16 documents, or things for production in disclosures, or in responses to discovery as
17 “CONFIDENTIAL,” “ATTORNEYS’ EYES ONLY,” and/or “ATTORNEYS’
18 EYES ONLY – SOURCE CODE.”

19 4. “CONFIDENTIAL” Material: information, documents, and things the
20 Designating Party believes in good faith is not generally known to others, and that
21 the Designating Party (i) would not normally reveal to third parties except in
22 confidence, or has undertaken with others to maintain in confidence, or
23 (ii) believes in good faith is protected by a right to privacy under federal or state
24 law, or any other applicable privilege or right related to confidentiality or privacy.

25 5. “ATTORNEYS’ EYES ONLY” Material: information, documents,
26 and things the Designating Party believes in good faith is not generally known to
27 others, and has significant competitive value such that unrestricted disclosure to
28 others would create a substantial risk of serious injury, and that the Designating

1 Party (i) would not normally reveal to third parties except in confidence, or has
2 undertaken with others to maintain in confidence, or (ii) believes in good faith is
3 significantly sensitive and protected by a right to privacy under federal or state law
4 or any other applicable privilege or right related to confidentiality or privacy. Any
5 technical document designated as “ATTORNEYS’ EYES ONLY” is automatically
6 subject to the Prosecution Bar provision set forth in Section G Below.

7 6. “ATTORNEYS’ EYES ONLY – SOURCE CODE”: RTL, HDL,
8 microcode, or other sensitive code (collectively, “SOURCE CODE”) that the
9 Designating Party believes in good faith is not generally known to others, and has
10 significant competitive value such that unrestricted disclosure to others would
11 create a substantial risk of serious injury, and that the Designating Party (i) would
12 not normally reveal to third parties except in confidence, or has undertaken with
13 others to maintain in confidence, or (ii) believes in good faith is significantly
14 sensitive and protected under federal or state law, or any other applicable privilege
15 or right related to confidentiality or privacy. Any document designated as
16 “ATTORNEYS’ EYES ONLY – SOURCE CODE” is automatically subject to the
17 Prosecution Bar provision set forth in Section G Below.

18 (a)

19 7. “Producing Party”: a Party or non-party that produces Material in this
20 action.

21 8. “Receiving Party”: a Party that receives Material from a Producing
22 Party.

23 9. “Designated Material”: Material that is designated
24 “CONFIDENTIAL,” “ATTORNEYS’ EYES ONLY,” or “ATTORNEYS’ EYES
25 ONLY – SOURCE CODE” under this Order.

26 10. “Counsel of Record”: (i) outside counsel who appears on the
27 pleadings as counsel for a Party, (ii) partners, principals, counsel, associates,
28 employees and contract attorneys of such outside counsel to whom it is reasonably

1 necessary to disclose the information for this litigation, including supporting
2 personnel employed by the attorneys, such as paralegals, legal translators, legal
3 secretaries, legal clerks and shorthand reporters, and/or (iii) independent legal
4 translators retained to translate in connection with this action, or independent
5 shorthand reporters retained to record and transcribe testimony in connection with
6 this action.

7 11. “Outside Consultant”: a person with specialized knowledge or
8 experience in a matter pertinent to the litigation who has been retained by Counsel
9 of Record to serve as an expert witness, or as a consultant in this action, and who is
10 not a current employee of a Party or of a competitor of a Party and who, at the time
11 of retention, is not anticipated to become an employee of a Party or of a competitor
12 of a Party.

13 12. “Professional Vendors”: persons or entities that provide litigation
14 support services (e.g., photocopying; videotaping; translating; designing and
15 preparing exhibits, graphics, or demonstrations; organizing, storing, retrieving data
16 in any form or medium; etc.) and their employees and subcontractors who have
17 been retained by Counsel of Record in this action, and who are not current
18 employees of a Party or of a competitor of a Party and who, at the time of
19 retention, are not anticipated to become employees of a Party or of a competitor of
20 a Party. This definition includes ESI vendors, professional jury or trial consultants
21 retained in connection with this litigation, and mock jurors retained by such
22 consultants to assist them in their work. Professional vendors do not include
23 consultants who fall within the definition of Outside Consultant.

24 **B. Scope**

25 13. The protections conferred by this Order cover not only Designated
26 Material (as defined above), but also any information copied or extracted
27 therefrom, as well as all copies, excerpts, summaries, or compilations thereof.
28 Nothing herein shall alter or change in any way the discovery provisions of the

1 Federal Rules of Civil Procedure, or the Court’s deadlines provided in the Court’s
2 scheduling orders. Identification of any individual pursuant to this Protective Order
3 does not make that individual available for deposition, or any other form of
4 discovery outside of the restrictions and procedures of the Federal Rules of Civil
5 Procedure, and the Court’s deadlines.

6 **C. Access To Designated Material**

7 14. CONFIDENTIAL Material: Unless otherwise ordered by the Court or
8 permitted in writing by the Designating Party, a Receiving Party may disclose any
9 information, document or thing designated “CONFIDENTIAL” only to:

- 10 (a) Persons who appear on the face of Designated Material as an
11 author, addressee or recipient thereof;
- 12 (b) Counsel of Record;
- 13 (c) Up to three (3) employees of a Receiving Party (including a
14 parent company of a Receiving Party), and necessary secretarial
15 staff, who are responsible for providing oversight of or
16 assistance in the litigation, who have signed the
17 “Acknowledgement and Agreement To Be Bound By
18 Protective Order” attached hereto as Exhibit A, and provided an
19 executed copy to all Parties prior to receiving Designated
20 Material, however, as to Designated Material from third parties,
21 absent a court order or agreement of the third party, Designated
22 Material from third parties may not be disclosed to employees
23 of a Receiving Party;
- 24 (d) If any Receiving Party believes that more than three (3)
25 employees require access to confidential material, that party
26 may negotiate the issue directly with the Producing Party;
- 27 (e) Outside Consultants of the Receiving Party to whom disclosure
28 is reasonably necessary for this litigation, and who have signed

1 the “Acknowledgement and Agreement To Be Bound By
2 Protective Order” attached hereto as Exhibit A, and the
3 “Certification Of Consultant” attached hereto as Exhibit B;

4 (f) Witnesses at deposition and/or trial, provided that such
5 witnesses may not retain copies of Designated Material unless
6 permitted by other provisions of this Order;

7 (g) The Court and its personnel;

8 (h) Any designated arbitrator or mediator who is assigned to hear
9 this matter, or who has been selected by the Parties, and his or
10 her staff, who have signed the “Acknowledgement and
11 Agreement To Be Bound By Protective Order” attached hereto
12 as Exhibit A, and the “Certification Of Consultant” attached
13 hereto as Exhibit B;

14 (i) Court reporters and videographers employed in connection with
15 this case; and

16 (j) Professional Vendors to whom disclosure is reasonably
17 necessary for this litigation, including copy services, e-
18 discovery services, graphics vendors, trial service vendors and
19 translation services.

20 15. “ATTORNEYS’ EYES ONLY” Material and “ATTORNEYS’ EYES
21 ONLY – SOURCE CODE” Material: Unless otherwise ordered by the Court or
22 permitted in writing by the Designating Party, a Receiving Party may disclose any
23 information, documents or things designated “ATTORNEYS’ EYES ONLY” or
24 “ATTORNEYS’ EYES ONLY – SOURCE CODE” Material only to the following,
25 in addition to those identified in Paragraphs 26-27 below regarding use of
26 Designated Material at depositions:

27 (a) Persons who appear on the face of Designated Material as an
28 author, addressee or recipient thereof;

- 1 (b) Counsel of Record;
- 2 (c) Outside Consultants of the Receiving Party to whom disclosure
- 3 is reasonably necessary for this litigation, and who have signed
- 4 the “Acknowledgement and Agreement To Be Bound By
- 5 Protective Order” attached hereto as Exhibit A, and the
- 6 “Certification Of Consultant” attached hereto as Exhibit B;
- 7 (d) The Court and its personnel;
- 8 (e) Any designated arbitrator or mediator who is assigned to hear
- 9 this matter, or who has been selected by the Parties, and his or
- 10 her staff, who have signed the “Acknowledgement and
- 11 Agreement To Be Bound By Protective Order” attached hereto
- 12 as Exhibit A, and the “Certification Of Consultant” attached
- 13 hereto as Exhibit B;
- 14 (f) Court reporters and videographers employed in connection with
- 15 this case; and
- 16 (g) Professional Vendors to whom disclosure is reasonably
- 17 necessary for this litigation, including copy services, e-
- 18 discovery services, graphics vendors, trial service vendors and
- 19 translation services.

20 16. Each person to whom Designated Material may be disclosed, and who

21 is required to sign the “Acknowledgement and Agreement To Be Bound By

22 Protective Order” attached hereto as Exhibit A and, if applicable, the “Certification

23 Of Consultant” attached hereto as Exhibit B, shall do so, prior to the time such

24 Designated Material is disclosed to him or her.

25 17. At the request of the Designating Party, persons not permitted access

26 to Designated Material under the terms of this Protective Order shall not be present

27 at depositions while the Designating Party’s Designated Material is discussed or

28 otherwise disclosed. Pretrial and trial proceedings shall be conducted in a manner,

1 subject to the supervision of the Court, to protect Designated Material from
2 disclosure to persons not authorized to have access to such Material. Any Party
3 intending to disclose or discuss Designated Material at pretrial or trial proceedings
4 must give advance notice to assure the implementation of the terms of this
5 Protective Order.

6 **D. Access By Outside Consultants**

7 18. Notice. If a Receiving Party wishes to disclose another Party's
8 Designated Material to any Outside Consultant, such Receiving Party must provide
9 notice to counsel for the Designating Party, which notice shall include: (a) the
10 individual's name and business title; (b) business address; (c) business or
11 profession; (d) the individual's CV; (e) any previous or current relationship
12 (personal or professional) with any of the parties; (f) a list of other cases in which
13 the individual has testified (at trial or deposition) within the last five years; (g) a
14 list of all companies with which the individual has consulted or by which the
15 individual has been employed within the last four years (if any consultancy is
16 confidential, the parties shall meet and confer as to information needed by the
17 other Parties in order to evaluate the Outside Consultant's work); and (h) a signed
18 copy of the "Acknowledgement and Agreement To Be Bound By Protective
19 Order" attached as Exhibit A, and the "Certification Of Consultant" attached
20 hereto as Exhibit B.

21 19. Objections. The Designating Party shall have ten (10) days from
22 receipt of the notice specified in Paragraph 17 to object in writing to such
23 disclosure. Any such objection must set forth in detail the grounds on which it is
24 based. After the expiration of the 10-day period, if no objection has been asserted,
25 then Designated Material may be disclosed to the Outside Consultant pursuant to
26 the terms of this Order. However, if the Designating Party objects within the 10-
27 day period, the Receiving Party may not disclose Designated Material to the
28 challenged individual absent resolution of the dispute or Court Order. In the event

1 the Designating Party makes a timely objection, the parties shall promptly meet
2 and confer to try to resolve the matter by agreement. If the parties cannot reach an
3 agreement, then the party objecting to the disclosure shall raise this matter with the
4 Court and request an Order restricting such person's access to the Protected
5 Material. Failure to raise this matter with the Court within ten (10) business days
6 after service of the objection shall be deemed approval, and the person(s) shall
7 thereafter be qualified to have access to Protected Material. If the objecting party
8 fails to file a motion for protective order within the prescribed period, any
9 objection to the Outside Consultant is waived, and Designated Material may
10 thereafter be disclosed to such individual (upon signing the "Acknowledgement
11 and Agreement To Be Bound By Protective Order" attached hereto as Exhibit A).
12 If the Objecting party timely raises this matter with the Court as set forth above,
13 Designated Material shall not be disclosed to the challenged individual until and
14 unless a final ruling allowing such disclosure is made by this Court, or by the
15 consent of the Objecting party, whichever occurs first.

16 **E. Production of ATTORNEYS' EYES ONLY – SOURCE CODE**

17 **Material**

18 20. Source code.

- 19 (a) Unless otherwise agreed to in writing between the Producing
20 Party and the Receiving Party or otherwise produced by the
21 Producing Party directly to the Receiving Party, if SOURCE
22 CODE designated as "ATTORNEYS' EYES ONLY -
23 SOURCE CODE" is to be made available for inspection,
24 SOURCE CODE designated as "ATTORNEYS' EYES ONLY
25 – SOURCE CODE" shall only be provided, upon request, on at
26 least two stand-alone computers (that is, computers not
27 connected to a network, Internet or a peripheral device) at
28 secure locations, to be made available during regular business

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hours (9:00 am to 5:00 pm, local time) on reasonable notice of at least two business days, absent exigent circumstances or otherwise agreed to by the Producing Party. The parties agree to negotiate access from 5:00 p.m. through midnight local time on weekdays and will meet and confer individually in good faith to provide such access. Upon reasonable notice, the parties agree to provide reasonable access to secure locations on Saturdays and Sundays and will meet and confer individually in good faith to provide such access. The Receiving Party is expected and agrees to make reasonable efforts to restrict its access to normal business hours except where necessary to accommodate the work schedules of its source code reviewers. The Producing Party is expected and agrees to reasonably permit after hours and weekend access to accommodate such circumstances. At the Producing Party's selection, the secure locations will be either in California, and/or Washington, D.C., or other location agreed to by the parties. The secure locations will be at the offices of Counsel of Record, the offices of the producing party, or an escrow facility. If the production of source code is at an escrow facility, all reasonable costs associated therewith will be shared equally between the Receiving Party and the Producing Party other than costs associated with software for reviewing the source code which shall be paid for by the party requesting such software. If the production of source code is at a location other than an escrow facility, the costs associated with software for reviewing the SOURCE CODE shall be paid for by the party requesting such software. Upon written request by the Receiving Party, beginning one week prior to the beginning of

1 trial and continuing through the end of trial, access to the
2 source code must be provided under the same conditions and
3 with the same limitations and restrictions as provided in this
4 Paragraph in Los Angeles, California.

5 (b) The Receiving Party (including all experts, consultants, lawyers
6 retained by the Receiving Party who may review the source
7 code under this Protective Order) may use and, to the extent
8 necessary, load onto the secure computer(s) searching or
9 analytical tools for inspection of the source code, so long as the
10 searching or other analytical tools for inspection of the source
11 code is disclosed by the Requesting Party at least two (2)
12 business days in advance of the inspection, providing however
13 that the Producing Party reserves all objections to any such
14 searching or analytical tools. The Receiving Party may create a
15 back-up copy of the source code on the stand-alone
16 computer(s). The searching or analytical tools may annotate,
17 number the lines of, and label the pages of, the backup copy of
18 the code. Any back-up copies will remain on the stand-alone
19 computer(s) and be subject to all of the provisions of this
20 Protective Order. The Receiving Party is permitted to use
21 laptop computers to take notes, record observations, etc., so
22 long as the laptop computers are never connected to the stand-
23 alone computer(s) and are not used to record the source code
24 itself.

25 (c) The Producing Party must enable the Receiving Party to print
26 paper copies of code at the time of inspection by the Receiving
27 Party, which paper copies shall be limited to the aspects of the
28 code directly necessary to the issues in the case. Furthermore,

1 the parties will also exchange (by hand delivery or overnight
2 delivery) copies of the paper copies of source code to be used as
3 exhibits for court proceedings, expert reports, and at
4 depositions, when so used. These additional copies will be
5 treated the same as the original print outs.

6 21. The Producing Party will produce source code in computer searchable
7 format at the secure location in the manner described above in Paragraph 19, but
8 need not produce executable code, unless requested by the Receiving Party. The
9 Producing Party also need not produce prior versions of the source code, unless
10 requested by the Receiving Party. All source code produced shall be organized in
11 one or more separate directories corresponding to accused product(s) and/or
12 accused model numbers or in the same directory structure as the source code is
13 kept or compiled in the ordinary course of business. Further, to the extent files for
14 one particular version of source code are grouped together in a single folder in the
15 ordinary course of the Producing Party's business, the Producing Party shall
16 produce the source code in that manner. If, for any reasons, source code files are
17 not produced for review, but, in the Receiving Party's sole determination, such
18 missing source code is deemed to be necessary to understand the operation of the
19 accused products, the parties agree to promptly meet and confer over the
20 production of any and all missing source code files requested by the Receiving
21 Party in a timely manner in the format described above. The Producing Party shall
22 not undertake any effort to determine which pages or portions of source code have
23 been reviewed. The Producing Party shall not videotape the actual review of the
24 source code by the Receiving Party. The Producing Party is permitted to audit the
25 review of the source code by the Receiving Party from time to time with
26 reasonable advance notice (e.g., a knock on the door of the room at the secure
27 location), but will not interfere with any work-product or listen to other private
28 communications between the Receiving Party reviewing the source code.

1 22. The Producing Party will enable the Receiving Party to print paper
2 copies of specific portions of SOURCE CODE designated as “ATTORNEYS’
3 EYES ONLY – SOURCE CODE” at the time of inspection by the Receiving
4 Party, which the Receiving Party may take when completing an inspection. The
5 Producing Party shall maintain a SOURCE CODE Access Log identifying, for
6 each and every time any SOURCE CODE is viewed, or accessed at the secure
7 location: (1) the name of each person who accessed the SOURCE CODE; (2) the
8 date and time of access; (3) the length of time of access; and (4) whether any hard
9 copies of any portion of SOURCE CODE were printed. Upon printing, the
10 Producing Party shall promptly Bates label the printed portions of the code and
11 provide a copy to the Receiving Party. The Producing Party shall also retain copies
12 of any portions of SOURCE CODE printed. The entire code or an unnecessarily
13 large portion of the code shall not be printed. The Receiving Party shall maintain a
14 log of all files that are printed or photocopied. Paper copies of SOURCE CODE
15 designated as “ATTORNEYS’ EYES ONLY – SOURCE CODE” shall include
16 Bates number and confidentiality labels when printed. The Receiving Party or
17 Outside Consultants of the Receiving Party shall keep the printouts or photocopies
18 in a secured locked area in the office of the Counsel of Record when not in use.
19 The Receiving Party and Outside Consultants may also temporarily keep the
20 printouts or photocopies at: (i) the sites where any depositions relating to the
21 SOURCE CODE are taken for the dates associated with the taking of the
22 deposition; (ii) the Court; or (iii) any intermediate location reasonably necessary to
23 transport the information (e.g., a hotel prior to a deposition). SOURCE CODE
24 may not be transported or transmitted electronically over a network of any kind,
25 including a LAN, an intranet, or the Internet.

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1 **F. Financial Summaries**

2 23. For the mutual convenience of the parties, a Producing Party may
3 generate certain financial summaries for the purpose of this litigation. To the extent
4 a Producing Party produces such financial summaries in a digital format (e.g.,
5 PDF, TIFF, Word, or Excel file) and password protects such summaries, the
6 Receiving Party will maintain such password protection.

7 **G. Prosecution Bar**

8 24. Prosecution Bar. The parties note that they have differing views
9 regarding the appropriate prosecution bar, they have briefed the issues regarding
10 the appropriate prosecution bar (Doc. Nos. 93, 109, 110), and the Court held a
11 hearing regarding the prosecution bar provision on May 20, 2013. The parties
12 agree that the status quo shall remain in effect with respect to the prosecution bar
13 issue until the Court rules on the issue.

14
15 **H. Use Of Designated Material**

16 25. Use Of Designated Material By Receiving Party. Unless otherwise
17 ordered by the Court, or agreed to in writing by the Parties, all Designated
18 Material, and all information derived therefrom, shall be used by the Receiving
19 Party only for purposes of this litigation, except as described below in this
20 Paragraph 25 and shall not be used in any other way, or for any other purpose,
21 including the acquisition, preparation or prosecution before the Patent Office of
22 any patent, patent application, for drafting or revising patent claims, or in
23 connection with patent licensing. Information contained or reflected in Designated
24 Materials shall not be disclosed in conversations, presentations by parties or
25 counsel, in court or in other settings that might reveal Designated Material, except
26 in accordance with the terms of this Order.

27 26. Use Of Designated Material By Designating Party. Nothing in this
28 Order shall limit any Designating Party's use of its own documents and

1 information, nor shall it prevent the Designating Party from disclosing its own
2 confidential information, documents or things to any person. Such disclosure shall
3 not affect any designations made pursuant to the terms of this Order, so long as the
4 disclosure is made in a manner that is reasonably calculated to maintain the
5 confidentiality of the information.

6 27. Use of Designated Material at Depositions. Except as may be
7 otherwise ordered by the Court, any person may be examined as a witness at
8 depositions and trial, and may testify concerning all Designated Material of which
9 such person has prior knowledge. The following general guidelines also apply:

- 10 (a) A present director, officer, employee, designated Rule 30(6)(b)
11 witness, and/or Outside Consultant of a Producing Party may be
12 examined, and may testify concerning all Designated Material
13 that has been produced by that party;
- 14 (b) A former director, officer, agent and/or employee of a
15 Producing Party may be interviewed, examined and may testify
16 concerning all Designated Material of which he or she has prior
17 knowledge, including any Designated Material that refers to
18 matters of which the witness has personal knowledge, that has
19 been produced by that Party and that pertains to the period or
20 periods of his or her employment; and
- 21 (c) non-parties may be examined or may testify concerning any
22 document containing Designated Material of a Producing Party
23 that appears on its face, or from other documents or testimony,
24 to have been received from, or communicated to, the non-party
25 as a result of any contact or relationship with the Producing
26 Party, or a representative of such Producing Party. Any person
27 other than the witness, his or her attorney(s), and any person
28 qualified to receive Designated Material under this Order, shall

1 be excluded from the portion of the examination concerning
2 such information, unless the Producing Party consents to
3 persons other than qualified recipients being present at the
4 examination. If the witness is represented by an attorney who is
5 not qualified under this Order to receive such information, then
6 prior to the examination, the attorney shall be requested to sign
7 the “Acknowledgement and Agreement To Be Bound By
8 Protective Order” attached as Exhibit A. In the event that such
9 attorney declines to sign the Acknowledgement and Agreement
10 To Be Bound By Protective Order prior to the examination, the
11 parties, by their attorneys, shall jointly seek a protective order
12 from the Court prohibiting such attorney from disclosing such
13 Designated Material.

14 28. A witness who previously had access to a document designated
15 “ATTORNEYS’ EYES ONLY” or “ATTORNEYS’ EYES ONLY – SOURCE
16 CODE” but who is not under a present non-disclosure agreement with the
17 Producing Party that covers that document, may be shown the document if the
18 witness is advised on the record of the existence of the Protective Order and that
19 the protective order requires the parties to keep confidential any questions,
20 testimony or documents that are designated as “CONFIDENTIAL”,
21 “ATTORNEYS’ EYES ONLY,” or “ATTORNEYS’ EYES ONLY – SOURCE
22 CODE.” The witnesses may not copy, take notes on or retain copies of any
23 Designated Material used or reviewed at the deposition. The witness may not take
24 out of the deposition room any exhibit that is marked “CONFIDENTIAL”,
25 “ATTORNEYS’ EYES ONLY” or “ATTORNEYS’ EYES ONLY – SOURCE
26 CODE.” The Producing Party of any Designated Material used at the deposition
27 may also require that the transcript and exhibits not be copied by the witness or his
28 counsel, that no notes may be made of the transcript or the exhibits, and that the

1 transcript and exhibits may only be reviewed by the witness in the offices of one of
2 the counsel representing a party in this case (or another firm acting for one of the
3 counsel representing a party in this case and under the supervision of one of the
4 lawyers who is bound by the terms of this Order). The restrictions in this Paragraph
5 apply only to a witness who is not subject to this Order.

6 **I. Procedure for Designating Materials**

7 29. Subject to the limitations set forth in this Order, a Designating Party
8 may: designate as “CONFIDENTIAL” information that the Designating Party
9 believes, in good faith, meets the definition set forth in Paragraph 4 above;
10 designate as “ATTORNEYS’ EYES ONLY” information that it believes, in good
11 faith, meets the definition set forth in Paragraph 5 above; and designate as
12 “ATTORNEYS’ EYES ONLY – SOURCE CODE” information that it believes, in
13 good faith, meets the definition set forth in Paragraph 6 above..

14 30. Except as provided above in Section E with respect to
15 “ATTORNEYS’ EYES ONLY – SOURCE CODE” Material, any material
16 (including physical objects) made available for initial inspection by counsel for the
17 Receiving Party prior to producing copies of selected items shall initially be
18 considered, as a whole, to constitute “ATTORNEYS’ EYES ONLY” information,
19 and shall be subject to this Order. Thereafter, the Producing Party shall have ten
20 (10) calendar days from the inspection to review and designate the appropriate
21 documents as “CONFIDENTIAL” and/or “ATTORNEYS’ EYES ONLY” prior to
22 furnishing copies to the Receiving Party.

23 31. Except as otherwise provided in this Order or as otherwise stipulated
24 or ordered, Material that qualifies for protection under this Order must be
25 designated in accordance with this Section I before the Material is disclosed or
26 produced.

27 32. Designation in conformity with this Order shall be made as follows:

28 (a) For information in documentary form (apart from transcripts of

1 depositions, or other pretrial or trial proceedings), the
2 Producing Party shall affix the legend “CONFIDENTIAL,”
3 “ATTORNEYS’ EYES ONLY,” or “ATTORNEYS’ EYES
4 ONLY – SOURCE CODE” on each page that contains
5 Designated Material.

6 (b) For testimony given in deposition, or in other pretrial or trial
7 proceedings, the Designating Party shall specify any portions of
8 the testimony that it wishes to designate as
9 “CONFIDENTIAL,” “ATTORNEYS’ EYES ONLY,” or
10 “ATTORNEYS’ EYES ONLY – SOURCE CODE.” In the case
11 of depositions, the Designating Party may also designate any
12 portion of a deposition transcript as “CONFIDENTIAL,”
13 “ATTORNEYS’ EYES ONLY,” or “ATTORNEYS’ EYES
14 ONLY – SOURCE CODE” by informing the reporter, and
15 opposing Parties, in writing within thirty (30) calendar days of
16 completion of the deposition of the designations to be applied.
17 All deposition transcripts not marked at least
18 “CONFIDENTIAL” during the deposition will nonetheless be
19 treated as “CONFIDENTIAL” until the thirty (30) day period
20 has expired.

21 (c) For information produced in some form other than
22 documentary, and for any other tangible items, the Producing
23 Party shall affix in a prominent place on the exterior of the
24 container or containers in which the information or thing is
25 stored the legend “CONFIDENTIAL” “ATTORNEYS’ EYES
26 ONLY” or “ATTORNEYS’ EYES ONLY – SOURCE CODE.”

27 (d) The provisions of subparagraphs 32(a)-(c) do not apply to
28 documents produced in native format. For documents produced

1 in native format, the parties shall provide written notice to the
2 Receiving Party of any confidentiality designations at the time
3 of production, label the production medium and identify the
4 confidentiality in the filename of the document.

5 **J. No Waiver of Privilege**

6 33. Subject to the provisions of Federal Rule of Evidence 502, inspection
7 or production of documents (including physical objects) shall not constitute a
8 waiver of the attorney-client privilege, work product immunity, or any other
9 applicable privilege or immunity, if, after a Party becomes aware of any such
10 disclosure, that Party designates any such documents as within the attorney-client
11 privilege, work product immunity or any other applicable privilege or immunity,
12 and requests in writing return or destruction of such documents. Upon request, the
13 Receiving Party shall immediately retrieve and return or destroy all copies of such
14 document(s). Nothing herein shall prevent the Receiving Party from challenging
15 the propriety of the attorney-client privilege, work product immunity or other
16 applicable privilege or immunity designation by submitting a written challenge to
17 the Court; provided, however, that such challenge shall not assert as a ground for
18 challenge the fact of the initial production or inspection of the documents later
19 designated as attorney-client privileged, work product, or subject to another
20 applicable privilege or immunity.

21 **K. Inadvertent Failure To Designate**

22 34. An inadvertent failure to designate qualified information, documents
23 or things as “CONFIDENTIAL,” “ATTORNEYS’ EYES ONLY,” or
24 “ATTORNEYS’ EYES ONLY – SOURCE CODE” does not, standing alone,
25 waive the Designating Party’s right to secure protection under this Order for such
26 material. Upon discovery of an inadvertent failure to designate, a Producing Party
27 may notify the Receiving Party in writing that the material is to be designated as
28 “CONFIDENTIAL,” “ATTORNEYS’ EYES ONLY,” or “ATTORNEYS’ EYES

1 ONLY – SOURCE CODE.” Upon receipt of such notice, the Receiving Party must
2 make reasonable efforts to assure that the material is treated in accordance with the
3 terms of this Order, subject to the right to challenge the propriety of such
4 designation(s). The Producing Party shall provide substitute copies of documents
5 bearing the confidentiality designation.

6 **L. Filing Designated Material**

7 35. Without written permission from the Designating Party or a Court
8 Order secured after appropriate notice to all interested persons, a Party may not file
9 in the public record in this action any Designated Material, but must file such
10 Designated Material under seal in conformance with the Court’s rules and
11 procedures. Material filed under seal shall bear the title of this matter, an indication
12 of the nature of the contents of such sealed filing, the words “CONFIDENTIAL
13 INFORMATION – UNDER PROTECTIVE ORDER,” “ATTORNEYS’ EYES
14 ONLY INFORMATION - UNDER PROTECTIVE ORDER,” or “ATTORNEYS’
15 EYES ONLY – SOURCE CODE INFORMATION – UNDER PROTECTIVE
16 ORDER,” as appropriate, and a statement substantially in the following form:

17 This filing contains confidential information filed in this case by (name of
18 party) and its contents shall not be displayed or revealed except by order of the
19 Court presiding over this matter.

20 **M. Challenges to Confidentiality Designations**

21 36. The Parties will use reasonable care when designating documents or
22 information as “CONFIDENTIAL,” “ATTORNEYS’ EYES ONLY,” and
23 “ATTORNEYS’ EYES ONLY – SOURCE CODE.” Nothing in this Order shall
24 prevent a Receiving Party from contending that any or all documents or
25 information designated as CONFIDENTIAL Material, ATTORNEYS’ EYES
26 ONLY Material, or “ATTORNEYS’ EYES ONLY – SOURCE CODE” Material
27 have been improperly designated.

28 37. If any Party disagrees with the designation of any documents or

1 information as “CONFIDENTIAL,” “ATTORNEYS’ EYES ONLY,” or
2 “ATTORNEYS’ EYES ONLY - SOURCE CODE,” then the parties to the dispute,
3 after providing notice to the Producing Party, shall attempt to resolve the dispute
4 informally and in good faith before presenting the dispute to the Court, in
5 accordance with C.D. Cal. L.R. 37-1. All documents and information objected to
6 shall continue to be treated as originally designated by the Producing Party,
7 pending resolution of the dispute. If the dispute cannot be resolved informally,
8 then the objecting party may file an application with the Court seeking to have the
9 confidential designation removed or altered, in accordance with C.D. Cal. L.R. 37-
10 2. The Producing Party shall bear the burden of establishing that the documents
11 and/or information is properly designated pursuant to the terms of this Protective
12 Order. The documents and/or information shall continue to be treated as originally
13 designated by the Producing Party pending resolution of the dispute.

14 38. A Party shall not be obligated to challenge the propriety of a
15 “CONFIDENTIAL,” “ATTORNEYS’ EYES ONLY” or “ATTORNEYS’ EYES
16 ONLY – SOURCE CODE” designation at the time made, and the failure to do so
17 shall not preclude a subsequent challenge thereto. Such a challenge shall be
18 written, shall be served on counsel for the Producing Party, and shall identify
19 particularly the documents or information that the Receiving Party contends should
20 be differently designated. The parties shall use their best efforts to resolve
21 promptly and informally such disputes in accordance with all applicable rules. If
22 agreement cannot be reached, the Receiving Party shall request that the Court
23 cancel or modify a “CONFIDENTIAL,” “ATTORNEYS’ EYES ONLY,” or
24 “ATTORNEYS’ EYES ONLY – SOURCE CODE” designation.

25 **N. Protected Material Subpoenaed or Ordered Produced In Other**
26 **Litigation**

27 39. If a Receiving Party is served with a subpoena or a court order that
28 would compel disclosure of any information, documents or things designated in

1 this action as “CONFIDENTIAL,” “ATTORNEYS’ EYES ONLY” or
2 “ATTORNEYS’ EYES ONLY – SOURCE CODE,” the Receiving Party must so
3 notify the Designating Party, in writing (by fax and email) promptly, and in no
4 event more than ten (10) calendar days after receiving the subpoena or order. Such
5 notification must include a copy of the subpoena or order. The Receiving Party
6 also must immediately inform, in writing, the party who caused the subpoena or
7 order to issue that some or all of the material covered by the subpoena or order is
8 subject to this Protective Order. In addition, the Receiving Party must deliver a
9 copy of this Protective Order promptly to the party in the other action that caused
10 the subpoena or order to issue. The purpose of imposing these duties is to alert the
11 interested parties to the existence of this Protective Order and to afford the
12 Designating Party in this case an opportunity to try to protect its confidentiality
13 interests in the court from which the subpoena or order issued. The Designating
14 Party shall bear the burdens and the expenses of seeking protection in that court of
15 its Designated Material. Nothing in these provisions should be construed as
16 authorizing or encouraging a Receiving Party in this action to disobey a lawful
17 directive from another court.

18 **O. Unauthorized Disclosure Of Designated Material**

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

27 **P. Non-Party Use of this Protective Order**

28 41. A non-party that produces Material voluntarily, or pursuant to a

1 subpoena or a court order, may designate such Material in the same manner, and
2 shall receive the same level of protection under this Protective Order, as any Party
3 to this lawsuit.

4 42. A non-party's use of this Protective Order to protect its
5 "CONFIDENTIAL" Material, "ATTORNEYS' EYES ONLY" Material, or
6 "ATTORNEYS' EYES ONLY – SOURCE CODE" Material does not entitle that
7 non-party access to "CONFIDENTIAL" Material, "ATTORNEYS' EYES ONLY"
8 Material, or "ATTORNEYS' EYES ONLY – SOURCE CODE" Material
9 produced by any Party in this case.

10 **Q. Discovery from Outside Consultants**

11 43. Testifying experts' draft reports, notes, and outlines of draft reports
12 shall not be subject to discovery in this case, nor shall any such drafts, notes or
13 outlines of draft reports that the testifying expert prepared in other cases be subject
14 to discovery in this case.

15 44. Discovery of materials provided to testifying experts shall be limited
16 to those materials, facts, consulting expert opinions, and other matters actually
17 relied upon by the testifying expert in forming his or her final report, trial or
18 deposition testimony, or any opinion in this case. No discovery can be taken from
19 any consulting expert who does not testify, except to the extent that consulting
20 expert has provided information, opinions or other materials to a testifying expert,
21 who then relies upon such information, opinions or other materials in forming his
22 or her final report, trial or deposition testimony or any opinion in this case.

23 45. No conversations or communications between Counsel of Record and
24 any testifying or consulting expert will be subject to discovery unless the
25 conversations or communications are relied upon by such experts in formulating
26 opinions that are presented in reports, trial or deposition testimony in this case.

27 46. Materials, communications (including email) and other information
28 exempt from discovery under the foregoing Paragraphs shall be treated as attorney-

1 work product for the purposes of this litigation and Protective Order.

2 **R. Communications between Party and Counsel of Record**

3 47. The parties agree that privileged or protected communications
4 occurring on or after November 18, 2011 need not be recorded on the party's
5 privilege log or produced in this case.

6 **S. Duration**

7 48. Even after the termination of this action, the confidentiality
8 obligations imposed by this Order shall remain in effect until a Designating Party
9 agrees otherwise in writing or a court order otherwise directs.

10 **T. Final Disposition**

11 49. Unless otherwise ordered or agreed in writing by the Producing Party,
12 within sixty (60) calendar days after the final termination of this action, each
13 Receiving Party must destroy or return all Designated Material to the Producing
14 Party. As used in this Paragraph, "all Designated Material" includes all copies,
15 abstracts, compilations, summaries or any other form of reproducing or capturing
16 any of the Designated Material. The Receiving Party must submit a written
17 confirmation of the return or destruction to the Producing Party (and, if not the
18 same person or entity, to the Designating Party) by the 60-day deadline.
19 Notwithstanding this provision, Counsel of Record may retain an archival copy of
20 all pleadings, motion papers, deposition transcripts (including exhibits), transcripts
21 of other proceedings (including exhibits), expert reports (including exhibits),
22 discovery requests and responses (including exhibits), exhibits offered or
23 introduced into evidence at trial, legal memoranda, correspondence or attorney
24 work product, even if such materials contain Designated Material. Any such
25 archival copies that contain or constitute Designated Material remain subject to this
26 Protective Order as set forth in Section S (Duration), above.

27 **U. Miscellaneous**

28 50. Any of the notice requirements herein may be waived, in whole or in

1 part, but only by a writing signed by the Counsel of Record for the Party against
2 whom such waiver will be effective.

3 51. This Order is entered without prejudice to the right of any Party to
4 apply to the Court at any time for modification of this Order, when convenience or
5 necessity requires. Nothing in this Order abridges the right of any person to seek to
6 assert other objections. No Party waives any right it otherwise would have to
7 object to disclosing or producing any information, documents, or things on any
8 ground not addressed in this Protective Order. Similarly, no Party waives any right
9 to object on any ground to the use in evidence of any of the material covered by
10 this Protective Order. The Court shall take appropriate measures to protect
11 Designated Material at trial and any hearing in this case.

12 52. This Order shall not diminish any existing obligation or right with
13 respect to Designated Material, nor shall it prevent a disclosure to which the
14 Designating Party consents in writing before the disclosure takes place.

15 53. The United States District Court for the Central District of California,
16 Western Division, is responsible for the interpretation and enforcement of this
17 Protective Order. All disputes concerning Designated Material produced under the
18 protection of this Protective Order shall be resolved by the United States District
19 Court for the Central District of California, Western Division. Every individual
20 who receives any Designated Material agrees to subject himself or herself to the
21 jurisdiction of this Court for the purpose of any proceedings related to performance
22 under, compliance with, or violation of this Order.

23
24 SIGNED this 9th day of July, 2013.

25 /s/ Andrew J. Wistrich

26 The Honorable Andrew Wistrich
27 UNITED STATES MAGISTRATE JUDGE
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EXHIBIT A
ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND
BY PROTECTIVE ORDER

I, _____ [print or type full name], state:

1. My business address is _____;

2. My present employer is _____;

3. My present occupation or job description _____;

4. I agree to keep confidential all information provided to me in the matter of BRANDYWINE COMMUNICATIONS TECHNOLOGIES, LLC v. TOSHIBA CORPORATION and TOSHIBA AMERICA INFORMATION SYSTEMS, INC., Civil Action No. 2:12-cv-03211-JAK-AJW (C.D. Cal.) in the United States District Court for the Central District of California, Western Division, in accordance with the restrictions in the Protective Order, and to be subject to the authority of that Court in the event of any violation or dispute related to this Protective Order.

5. I have been informed of and have reviewed the Protective Order entered in this case, and I will not divulge any information, documents or things that are subject to the Protective Order except in accordance with the provisions of the Order;

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EXHIBIT B
CERTIFICATION OF CONSULTANT

I, _____ [print or type full name], of _____ am not an employee of the Party who retained me or of a competitor of the opposing Party and will not use any information, documents, or things that are subject to the Protective Order in the matter of BRANDYWINE COMMUNICATIONS TECHNOLOGIES, LLC v. TOSHIBA CORPORATION and TOSHIBA AMERICA INFORMATION SYSTEMS, INC., Civil Action No. 2:12-cv-03211-JAK-AJW (C.D. Cal) for any purpose other than this litigation. If at any time after I execute this Certificate of Consultant and during the pendency of the Action and my retention, I decide to accept employment by a competitor of the opposing Party, I will promptly (before I become employed) inform the counsel for the party who retained me in the Action and the opposing party, and I will not thereafter review any Designated Materials marked by the opposing Party as "CONFIDENTIAL," "ATTORNEYS' EYES ONLY," OR "ATTORNEYS' EYES ONLY – SOURCE CODE" unless and until the Parties agree or the Court orders otherwise.

I state under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on _____

[Printed name]

[Signature]