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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10 **ALS SCAN, INC.,**

11 Plaintiff,

12 v.

13 **CLOUDFLARE, INC., et al.,**

14 Defendants.
15

Case No. 2:16-cv-05051-GW-AFM

**[PROPOSED] STIPULATED
PROTECTIVE ORDER¹ GOVERNING
THE PRODUCTION AND EXCHANGE
OF CONFIDENTIAL INFORMATION**

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17 **I.**

18 **A. PURPOSES AND LIMITATIONS**

19 Discovery in this action is likely to involve production of confidential, proprietary or
20 private information for which special protection from public disclosure and from use for any
21 purpose other than prosecuting this litigation may be warranted. Accordingly, the parties hereby
22 stipulate to and petition the Court to enter the following Stipulated Protective Order. The parties
23 acknowledge that this Order does not confer blanket protections on all disclosures or responses to
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27 ¹ This Stipulated Protective Order is based substantially on the model protective order
28 provided under Magistrate Judge Alexander F. MacKinnon's Procedures.

1 discovery and that the protection it affords from public disclosure and use extends only to the
2 information or items that are entitled to confidential treatment under applicable legal principles.

3 **B. GOOD CAUSE STATEMENT**

4 This action is likely to involve technological information, customer information and other
5 valuable research, development, commercial, financial, technical and/or proprietary information
6 for which special protection from public disclosure and from use for any purpose other than
7 prosecution of this action is warranted. Such confidential and proprietary materials and
8 information may consist of, among other things, confidential business or financial information,
9 information regarding confidential business practices, or other confidential research, development,
10 or commercial information (including information implicating privacy rights of third parties),
11 information otherwise generally unavailable to the public, or which may be otherwise protected
12 from disclosure under state or federal statutes, court rules, case decisions, or common law.

13 Accordingly, to expedite the flow of information, to facilitate the prompt resolution of
14 disputes over confidentiality of discovery materials, to adequately protect information the parties
15 are entitled to keep confidential, to ensure that the parties are permitted reasonable necessary uses
16 of such material in preparation for and in the conduct of trial, to address their handling at the end
17 of the litigation, and serve the ends of justice, a protective order for such information is justified in
18 this matter. It is the intent of the parties that information will not be designated as confidential for
19 tactical reasons and that nothing be so designated without a good faith belief that it has been
20 and/or should be maintained in a confidential, non-public manner, and there is good cause why it
21 should not be part of the public record of this case.

22 **C. ACKNOWLEDGMENT OF PROCEDURE FOR FILING UNDER SEAL**

23 The parties further acknowledge, as set forth in Section XI.C, below, that this Stipulated
24 Protective Order does not entitle them to file confidential information under seal; Local Civil Rule
25 79-5 sets forth the procedures that must be followed and the standards that will be applied when a
26 party seeks permission from the court to file material under seal.

1 The parties' mere designation of Disclosure or Discovery Material as CONFIDENTIAL or
2 HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY does not— without the submission
3 of competent evidence by declaration, establishing that the material sought to be filed under seal
4 qualifies as confidential, privileged, or otherwise protectable—make that material sealable.

5 Further, if a party requests sealing related to a dispositive motion or trial, the relief sought
6 shall be narrowly tailored to serve the specific interest to be protected. Again, competent evidence
7 supporting the application to file documents under seal must be provided by declaration.

8 Any document that is not confidential, privileged, or otherwise protectable in its entirety
9 should not be filed under seal if the confidential portions can be redacted without undue burden. If
10 documents can be redacted, then a redacted version for public viewing, omitting only the
11 confidential, privileged, or otherwise protectable portions of the document, shall be filed. Any
12 application that seeks to file documents under seal in their entirety should include an explanation
13 of why redaction is not feasible.

14 **II. DEFINITIONS**

15 1. **Action**: this pending federal lawsuit, *ALS Scan, Inc. v. Cloudflare, Inc. et al.*, No.
16 2:16-cv-05051-GW-AFM (C.D. Cal.).

17 2. **Challenging Party**: a Party or Non-Party that challenges the designation of
18 information or items under this Order.

19 3. **"CONFIDENTIAL" Information or Items**: information (regardless of how it is
20 generated, stored, or maintained) or tangible things that qualify for protection under Federal Rule
21 of Civil Procedure 26(c), and as specified **above** in the Good Cause Statement.

22 4. **Counsel**: Outside Counsel of Record and House Counsel (as well as their support
23 staff).

24 5. **Designating Party**: a Party or Non-Party that designates information or items that
25 it produces in disclosures or in responses to discovery as Confidential or Highly Confidential –
26 Attorneys' Eyes Only.

1 6. **Disclosure or Discovery Material**: all items or information, regardless of the
2 medium or manner in which it is generated, stored, or maintained (including, among other things,
3 testimony, transcripts, and tangible things), that are produced or generated in disclosures or
4 responses to discovery in this matter.

5 7. **Expert**: a person with specialized knowledge or experience in a matter pertinent to
6 the litigation who has been retained by a Party or its counsel to serve as an expert witness or as a
7 consultant in this Action.

8 8. **“HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”** refers to
9 extremely sensitive Confidential information, which has such highly significant competitive value
10 such that unrestricted disclosure to others would create a substantial risk of serious injury.

11 9. **House Counsel**: attorneys who are employees of a party to this Action and their
12 support staff. House Counsel does not include Outside Counsel of Record or any other outside
13 counsel.

14 10. **Non-Party**: any natural person, partnership, corporation, association, or other legal
15 entity not named as a Party to this action.

16 11. **Outside Counsel of Record**: attorneys who are not employees of a party to this
17 Action but are retained to represent or advise a party to this Action and have appeared in this
18 Action on behalf of that party or are affiliated with a law firm that has appeared on behalf of that
19 party, and includes support staff.

20 12. **Party**: any party to this Action, including all of its officers, directors, employees,
21 consultants, retained experts, and Outside Counsel of Record (and their support staffs).

22 13. **Producing Party**: a Party or Non-Party that produces Disclosure or Discovery
23 Material in this Action.

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

1 15. **Protected Material**: any Disclosure or Discovery Material that is designated as
2 Confidential or Highly Confidential - Attorneys' Eyes Only.

3 16. **Receiving Party**: a Party that receives Disclosure or Discovery Material from a
4 Producing Party.

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6 **III. SCOPE**

7 The protections conferred by this Stipulation and Order cover not only Protected Material
8 (as defined above), but also (1) any information copied or extracted from Protected Material; (2)
9 all copies, excerpts, summaries, or compilations of Protected Material; and (3) any testimony,
10 conversations, or presentations by Parties or their Counsel that might reveal Protected Material.

11 Any use of Protected Material at trial shall be governed by the orders of the trial judge.

12 **IV. DURATION**

13 Even after final disposition of this litigation, the confidentiality obligations imposed by this
14 Order remain in effect until a Designating Party agrees otherwise in writing or a court order
15 otherwise directs. Final disposition is the later of (1) dismissal of all claims and defenses in this
16 Action, with or without prejudice; and (2) final judgment herein after the completion and
17 exhaustion of all appeals, rehearings, remands, trials, or reviews of this Action, including the time
18 limits for filing any motions or applications for extension of time pursuant to applicable law.

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20 **V. DESIGNATING PROTECTED MATERIAL**

21 **A. Exercise of Restraint and Care in Designating Material for Protection.**

22 Each Party or Non-Party that designates information or items for protection under this
23 Order must take care to limit any such designation to specific material that qualifies under the
24 appropriate standards. The Designating Party must designate for protection only those parts of
25 material, documents, items, or oral or written communications that qualify so that other portions of
26 the material, documents, items or communications for which protection is not warranted are not
27 included.

1 Mass, indiscriminate, or routinized designations are prohibited. Designations that are
2 shown to be clearly unjustified or that have been made for an improper purpose may expose the
3 Designating Party to sanctions.

4 If it comes to a Designating Party's attention that information or items that it designated
5 for protection do not qualify for protection, that Designating Party must promptly notify all other
6 Parties that it is withdrawing the inapplicable designation.

7 **B. Manner and Timing of Designations.**

8 Except as otherwise provided in this Order, or as otherwise stipulated or ordered,
9 Disclosure or Discovery Material that qualifies for protection under this Order must be clearly so
10 designated before the material is disclosed or produced.

11 Designation in conformity with this Order requires:

12 (a) for information in documentary form (*e.g.*, paper or electronic documents,
13 but excluding transcripts of depositions or other pretrial or trial proceedings), that the Producing
14 Party affix at a minimum, the legend "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL –
15 ATTORNEYS' EYES ONLY", to each page that contains protected material. If only a portion of
16 the material on a page qualifies for protection, the Producing Party also must clearly identify the
17 protected portion(s) (*e.g.*, by making appropriate markings in the margins).

18 A Party or Non-Party that makes original documents available for inspection need not
19 designate them for protection until after the inspecting Party has indicated which documents it
20 would like copied and produced. During the inspection and before the designation, all of the
21 material made available for inspection shall be deemed "CONFIDENTIAL." After the inspecting
22 Party has identified the documents it wants copied and produced, the Producing Party must
23 determine which documents, or portions thereof, qualify for protection under this Order. Then,
24 before producing the specified documents, the Producing Party must affix the "CONFIDENTIAL
25 legend" to each page that contains Protected Material. If only a portion of the material on a page
26 qualifies for protection, the Producing Party also must clearly identify the protected portion(s)
27 (*e.g.*, by making appropriate markings in the margins).

1 (b) for testimony given in depositions, that the Designating Party identify all
2 protected testimony preferably on the record before the close of the deposition, but not later than
3 the creation of the final transcript of that deposition.

4 (c) for information produced in some form other than documentary and for any
5 other tangible items (excluding hard drives or other document storage media), that the Producing
6 Party affix in a prominent place on the exterior of the item the CONFIDENTIAL or HIGHLY
7 CONFIDENTIAL – ATTORNEYS’ EYES ONLY legend. If only a portion of the information
8 warrants protection, the Producing Party, to the extent practicable, must identify the protected
9 portion.

10 **C. Inadvertent Failures to Designate.**

11 If timely corrected upon discovery, an inadvertent failure to designate qualified
12 information or items does not waive the Designating Party’s right to secure protection under this
13 Order for such material. Upon timely correction of a designation, the Receiving Party must make
14 reasonable efforts to assure that the material is treated in accordance with the provisions of this
15 Order.

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17 **VI. CHALLENGING CONFIDENTIALITY DESIGNATIONS**

18 **A. Timing of Challenges.**

19 Any Party or Non-Party may challenge a designation of confidentiality at any time.

20 **B. Meet and Confer.**

21 The Challenging Party shall initiate the dispute resolution process under Civil Local Rule
22 37-1 *et seq.*

23 **C. Joint Stipulation.**

24 Any challenge submitted to the Court shall be via a joint stipulation pursuant to Local Rule
25 37-2.

26 The burden of persuasion in any such challenge proceeding shall be on the Designating
27 Party. Frivolous challenges, and those made for an improper purpose (*e.g.*, to harass or impose
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unnecessary expenses and burdens on other parties) may expose the Challenging Party to sanctions. Unless the Designating Party has waived or withdrawn the confidentiality designation, all parties shall continue to afford the material in question the level of protection to which it is entitled under the Producing Party's designation until the Court rules on the challenge.

VII. ACCESS TO AND USE OF PROTECTED MATERIAL

A. Basic Principles.

A Receiving Party may use Protected Material that is disclosed or produced by another Party or by a Non-Party in connection with this Action only for prosecuting, defending, or attempting to settle this Action. Such Protected Material may be disclosed only to the categories of persons and under the conditions described in this Order. When the Action has been terminated, a Receiving Party must comply with the provisions of section XII below (FINAL DISPOSITION).

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

B. Disclosure of "CONFIDENTIAL" Information or Items.

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

(a) the Receiving Party's Outside Counsel of Record in this Action, as well as employees of said Outside Counsel of Record to whom it is reasonably necessary to disclose the information for this Action;

(b) the officers, directors, and employees (including House Counsel) of the Receiving Party to whom disclosure is reasonably necessary for this Action;

(c) Experts (as defined in this Order) of the Receiving Party to whom disclosure is reasonably necessary for this Action and who have signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A) and, with respect to designated testimonial experts, which

1 such signed “Acknowledgment and Agreement to Be Bound” has been provided to Outside
2 Counsel of Record at least 5 (five) days prior to any disclosure of Confidential Information;
3 (d) the court and its personnel;
4 (e) court reporters and their staff;
5 (f) professional jury or trial consultants, mock jurors, and Professional Vendors
6 to whom disclosure is reasonably necessary for this Action and who have signed the
7 “Acknowledgment and Agreement to Be Bound” (Exhibit A);
8 (g) the author or recipient of a document containing the information or a
9 custodian or other person who otherwise possessed or knew the information;
10 (h) during their depositions, witnesses, and attorneys for witnesses, in the
11 Action to whom disclosure is reasonably necessary provided: (1) the deposing party requests that
12 the witness sign the “Acknowledgment and Agreement to Be Bound” (Exhibit A); and (2) they
13 will not be permitted to keep any confidential information if they do not sign the
14 “Acknowledgment and Agreement to Be Bound” (Exhibit A), unless otherwise agreed by the
15 Designating Party or ordered by the court. Pages of transcribed deposition testimony or exhibits
16 to depositions that reveal Protected Material may be separately bound by the court reporter and
17 may not be disclosed to anyone except as permitted under this Stipulated Protective Order; and
18 (i) any mediator or settlement officer, and their supporting personnel, mutually
19 agreed upon by any of the parties engaged in settlement discussions.

20 **C. Disclosure of “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”**
21 **Information or Items**

22 Unless otherwise ordered by the court or permitted in writing by the Designating Party,
23 material designated as “Highly Confidential – Attorneys’ Eyes Only” shall be treated as material
24 designated “Confidential” with the further restriction that it shall not be disclosed to any person
25 identified in Section VII.B(b) above.
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1 **VIII. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN**
2 **OTHER LITIGATION**

3 If a Party is served with a subpoena or a court order issued in other litigation that compels
4 disclosure of any Protected Material, that Party must:

5 (a) promptly notify in writing the Designating Party. Such notification **shall**
6 include a copy of the subpoena or court order;

7 (b) promptly notify in writing the party who caused the subpoena or order to
8 issue in the other litigation that some or all of the material covered by the subpoena or order is
9 subject to this Protective Order. Such notification shall include a copy of this Stipulated
10 Protective Order; and

11 (c) cooperate with respect to all reasonable procedures sought to be pursued by
12 the Designating Party whose Protected Material may be affected.

13 If the Designating Party timely seeks a protective order, the Party served with the subpoena
14 or court order shall not produce any Protected Material before a determination by the court from
15 which the subpoena or order issued, unless the Party has obtained the Designating Party's
16 permission. The Designating Party shall bear the burden and expense of seeking protection in that
17 court of its confidential material and nothing in these provisions should be construed as
18 authorizing or encouraging a Receiving Party in this Action to disobey a lawful directive from
19 another court.
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21 **IX. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL**

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

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4 **X. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE**
5 **PROTECTED MATERIAL**

6 When a Producing Party gives notice to Receiving Parties that certain inadvertently
7 produced material is subject to a claim of privilege or other protection, the obligations of the
8 Receiving Parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B). This
9 provision is not intended to modify whatever procedure the parties may separately agree upon to
10 resolve the inadvertent disclosure of a communication or information covered by the attorney-
11 client privilege or work-product protection.

12
13 **XI. MISCELLANEOUS**

14 **A. Right to Further Relief.**

15 Nothing in this Order abridges the right of any person to seek its modification by the Court
16 in the future.

17 **B. Right to Assert Other Objections.**

18 By stipulating to the entry of this Protective Order, no Party waives any right it otherwise
19 would have to object to disclosing or producing any information or item on any ground not
20 addressed in this Stipulated Protective Order. Similarly, no Party waives any right to object on
21 any ground to use in evidence of any of the material covered by this Protective Order.

22 **C. Filing Protected Material.**

23 A Party that seeks to file under seal any Protected Material must comply with Local Civil
24 Rule 79-5. Protected Material may only be filed under seal pursuant to a court order authorizing
25 the sealing of the specific Protected Material at issue.

1 **XII. FINAL DISPOSITION**

2 Within 60 days after the final disposition of this Action, as defined in Section IV, each
3 Receiving Party must return all Protected Material to the Producing Party or destroy such material.
4 As used in this section, "all Protected Material" includes all copies, abstracts, compilations,
5 summaries, and any other format reproducing or capturing any of the Protected Material. Whether
6 the Protected Material is returned or destroyed, the Receiving Party must submit a written
7 certification to the Producing Party (and, if not the same person or entity, to the Designating Party)
8 by the 60-day deadline that (1) identifies (by category, where appropriate) all the Protected
9 Material that was returned or destroyed and (2) affirms that the Receiving Party has not retained
10 any copies, abstracts, compilations, summaries or any other format reproducing or capturing any
11 of the Protected Material. Notwithstanding this provision, Counsel are entitled to retain an
12 archival copy of all pleadings, motion papers, trial, deposition, and hearing transcripts, legal
13 memoranda, correspondence, deposition and trial exhibits, expert reports, attorney work product,
14 and consultant and expert work product, even if such materials contain Protected Material. Any
15 such archival copies that contain or constitute Protected Material remain subject to this Protective
16 Order as set forth in Section IV.

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18 **XIII. VIOLATIONS**

19 Any violation of this Order may be punished by appropriate measures including, without
20 limitation, contempt proceedings and/or monetary sanctions.

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22 DATED: 2/3/2017

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25 Alexander F. McKinnon
26 United States Magistrate Judge

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EXHIBIT A

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, _____ [full name], of _____ [full address], declare under penalty of perjury that I have read in its entirety and understand the Stipulated Protective Order issued by the U.S. District Court for the Central District of California on _____ [date] in *ALS Scan, Inc. v. Cloudflare, Inc. et al.*, No. 2:16-cv-05051-GW-AFM (C.D. Cal.). I agree to be bound by all the terms of this Stipulated Protective Order, and I acknowledge that failure to comply could expose me to sanctions and punishment in the nature of contempt. I agree that I will not disclose in any manner to any person or entity any information or item that is subject to this Stipulated Protective Order, except in strict compliance with the provisions of this Order.

I further agree to submit to the jurisdiction of the U.S. District Court for the Central District of California for the purpose of enforcing the terms of this Stipulated Protective Order, even if such enforcement proceedings occur after termination of this action. I hereby appoint _____ [print or type full name] of _____ [print or type full address and telephone number] as my California agent for service of process in connection with this action or any proceedings related to enforcement of this Stipulated Protective Order.

Date: _____

City and State: _____

Printed name: _____

Signature: _____