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13 **UNITED STATES DISTRICT COURT**
14 **EASTERN DISTRICT OF CALIFORNIA**

16 ROBERT HENLEY

17 Plaintiff,

18 v.

19 LOWE'S HIW, INC., a California Corporation,
and DOES 1-50, inclusive,

20 Defendants.
21

Case No.: 1:13-cv-00684-LJO-SAB

STIPULATED PROTECTIVE ORDER

Hon. Lawrence J. O'Neill
Magistrate Judge Stanley Boone

1 (v) The issuance of this Protective Order will protect the parties' interests by providing
2 the parties recourse in this Court in the event that a party or non-party improperly handles non-
3 public, confidential, proprietary, commercially-sensitive and/or trade secret information that the
4 parties have had to exchange in the course of discovery propounded and depositions taken in this
5 action;

6 **WHEREAS**, the parties hereto, having stipulated and agreed, by and through their respective
7 counsel, to the entry of this Protective Order in the above-captioned action;

8 **IT IS HEREBY STIPULATED AS FOLLOWS:**

9 **1.0 Definitions.**

10 1.1 Party: Any party to this action, including all of its officers, directors,
11 employees, and in-house counsel (and their support staff).

12 1.2 Disclosures or Discovery Material: All items or information, regardless of the
13 medium or manner generated, stored, or maintained (including, among other things, testimony,
14 transcripts, documents or tangible things) that are produced or generated in disclosures or responses
15 to discovery in this matter.

16 1.3 "Confidential" Information or Items:

17 (i) Information that is a "trade secret" as that term is defined in 18 U.S.C.
18 § 1839;

19 (ii) Confidential and proprietary business and/or financial information;

20 (iii) Non-public information about any individual or individuals, including
21 personnel records, evaluations, compensation levels, databases, surveys, statistical analysis,
22 analyses of personnel practices, or other information incorporating or aggregating
23 information pertaining to individuals; and/or

24 (iv) Information alleged in good faith by a Party to be subject to protection
25 under the Federal Rules of Evidence and/or information that is confidential, of commercial
26 value, and falling into one or more of the following categories:

27 a. Lowe's HIW, Inc.'s policies and procedures for operating its
28 stores;

1 b. Documents that reflect the implementation of Lowe’s HIW,
2 Inc.’s policies and procedures for operating its stores;

3 c. Information that is protected against disclosure by a written
4 confidential information agreement between a third party and Plaintiff or Defendants; and

5 d. Business plans, models, marketing analyses, sales and financial
6 statements.

7 1.4 Designating Party: A Party or non-party that designates its Disclosures or
8 Discovery Material as “Confidential.”

9 1.5 Receiving Party: A Party that receives Disclosures or Discovery Material
10 from a Designating Party.

11 1.6 Protected Material: Any Disclosures or Discovery Material that is designated
12 as “Confidential.”

13 1.7 Outside Counsel: Attorneys who are not employees of a Party but who are
14 retained to represent or advise a Party in this action.

15 1.8 In-House Counsel: Attorneys who are employees of a Party.

16 1.9 Counsel (without qualifier): Outside Counsel and In-House Counsel (as well
17 as their support staffs).

18 1.10 Expert: A person with specialized knowledge or experience in a matter
19 pertinent to the litigation who has been retained by a Party or its Counsel to serve as an expert
20 witness or as a consultant in this litigation; and who is not a past or a current employee of a Party
21 and who, at the time of retention, was not anticipated to become an employee of a Party. This
22 definition includes a professional jury or trial consultant retained in connection with this litigation.

23 1.11 Professional Vendors: Persons or entities that provide litigation support
24 services (e.g., photocopying, videotaping, translating, preparing exhibits or demonstrations,
25 organizing, storing, retrieving data in any form or medium; etc.) and their employees and
26 subcontractors.

1 **2.0 Scope.**

2 The protections conferred by this Protective Order cover not only Protected Material (as
3 defined above), but also any information copied or extracted therefrom, as well as all copies,
4 excerpts, summaries, or compilations thereof, plus testimony, conversations, or presentations by
5 parties or counsel to or in court or in other settings that would reveal Protected Material.

6 **3.0 Duration.**

7 The Parties hereby voluntarily agree to comply with the terms of this Order immediately
8 upon its execution by all parties hereto, and they shall continue to comply with its terms regardless
9 of when or whether it is entered by the Court. Further, even after the termination of this litigation,
10 the confidentiality obligations imposed by this Protective Order shall remain in effect until a
11 Designating Party agrees otherwise in writing or a Court orders otherwise.

12 **4.0 Designating Protected Material.**

13 4.1 Exercise of Restraint and Care in Designating Disclosures or Discovery
14 Material for Protection: Each Party or non-party that designates Disclosures or Discovery Material
15 for protection under this Order must take care to limit any such designation to specific Disclosures or
16 Discovery Material that qualifies under the appropriate confidentiality standard. A Designating
17 Party must take care to designate for protection only those parts of the Disclosures or Discovery
18 Material, so that other portions of the Disclosures or Discovery Material for which protection is not
19 warranted are not swept unjustifiably within the ambit of this Protective Order. If it comes to a
20 Designating Party's attention that Disclosures or Discovery Material that that Party designated for
21 protection does not qualify for protection at all, or does not qualify for the level of protection
22 initially asserted, that Designating Party must promptly notify all other parties that it is withdrawing
23 the improper designation.

24 4.2 Manner and Timing of Designations: Except as otherwise provided in this Protective
25 Order (*see, e.g.*, second paragraph of section 4.2(a), below), or as otherwise stipulated or ordered,
26 Disclosures or Discovery Material that qualifies for protection under this Protective Order must be
27 clearly so designated before such material is produced. Designation in conformity with this
28 Protective Order requires:

1 4.2(a) For Disclosures or Discovery Material in documentary form (apart
2 from transcripts of depositions or other pretrial proceedings), that the Designating Party affix
3 the legend “CONFIDENTIAL” prominently on each page that contains Protected Material.
4 If only a portion or portions of a document or material on a page qualifies for protection, the
5 Designating Party also must clearly identify the protected portion(s) (*e.g.*, by making
6 appropriate markings in the margins).

7 A Party or non-party that makes original Disclosures or Discovery Material
8 available for inspection need not designate them for protection until after the inspecting Party
9 has indicated which Disclosures or Discovery Material it seeks to have copied and produced.
10 During the inspection and before the designation, all of the Disclosures or Discovery
11 Material made available for inspection shall be deemed “Confidential.” After the inspecting
12 Party has identified the Disclosures or Discovery Material it seeks to have copied and
13 produced, the Designating Party must determine which, if any, Disclosures or Discovery
14 Material, or portions thereof, qualify for protection under this Protective Order. Prior to
15 producing the specified Disclosures or Discovery Material, the Designating Party must affix
16 the appropriate “Confidential” legend prominently on each page as set forth above.

17 4.2(b) For Disclosures or Discovery Material in the form of testimony given
18 in deposition or in other pretrial proceedings, that the Party or non-party offering the
19 testimony identify on the record, before the close of the deposition, hearing, or other
20 proceeding, all protected testimony, and further specify any portions of the testimony that
21 qualify as “Confidential” information.

22 Any Party may also designate testimony that is entitled to protection by
23 notifying all Parties in writing within twenty (20) days of receipt of the transcript, of the
24 specific pages and lines of the transcript that should be treated as “Confidential” thereafter.
25 Each Party shall attach a copy of such written notice or notices to the face of the transcript
26 and each copy thereof in its possession, custody, or control. Unless otherwise indicated, all
27 deposition transcripts shall be treated as “Confidential” for a period of twenty (20) days after
28 the receipt of the transcript. This preliminary treatment, however, shall not limit a

1 deponent’s right to review the transcript of his or her deposition under Federal Rule of Civil
2 Procedure 30(e)(1).

3 Transcript pages containing Protected Material must be separately bound by
4 the court reporter, who must prominently affix on each such page the legend “Confidential”
5 as instructed by the Party or non-party offering or sponsoring the witness or presenting the
6 testimony.

7 4.2(c) For Disclosures or Discovery Material produced other than in
8 documentary or testimony form, and for any other tangible items, that the Designating Party
9 affix in a prominent place on the exterior of the container in which or disk (or similar device)
10 on which the information or item is stored the legend “Confidential.” If only portions of the
11 information or item warrant protection, the Designating Party, to the extent practicable, shall
12 identify the protected portions, specifying whether they qualify as “Confidential.”

13 4.3 Inadvertent Failures to Designate: An inadvertent failure to designate
14 qualified information or items as “Confidential” does not, standing alone, waive the Designating
15 Party’s right to secure protection under this Protective Order for such material. If any Disclosures or
16 Discovery Material is appropriately designated as “Confidential” after the material was initially
17 produced, the Receiving Party, on notification of the designation, must make reasonable efforts to
18 assure that the material is treated in accordance with the provisions of this Protective Order.

19 4.4 Nonparty Designations During Deposition: During the deposition of any
20 nonparty, the nonparty may designate any Disclosures or Discovery Material as “Confidential” so
21 long as it is conducted in good faith. Further, any nonparty seeking to invoke any protection
22 accorded by the Protective Order must either provide a copy of the “Agreement to Be Bound by
23 Protective Order” (attached as Exhibit A) executed by the nonparty to all counsel of record for the
24 Parties or so agree on the record during the deposition.

25 **5.0 Access To And Use Of Protected Material.**

26 5.1 Basic Principles: A Receiving Party may use Protected Material that is
27 disclosed or produced by another Party or by a non-party in connection with this case only for
28 prosecuting, defending, or attempting to settle this litigation. Such Protected Material may be

1 disclosed only to the categories of persons and under the conditions described in this Protective
2 Order. When the litigation has been terminated, a Receiving Party must comply with the provisions
3 of Section 10 below. Protected Material must be maintained by a Receiving Party at a location and
4 in a secure manner that ensures that access is limited to persons authorized under this Protective
5 Order.

6 5.2 Disclosure of “Confidential” Information or Items: Unless otherwise ordered
7 by the Court, or permitted in writing by the Designating Party, a Receiving Party may disclose any
8 information or item designated “Confidential” only to the following:

9 5.2(a) The Receiving Party, who may share confidential information and items
10 with its officers, directors, and employees (including In-House Counsel) to whom disclosure
11 is reasonably necessary for this litigation;

12 5.2(b) Outside Counsel in this litigation, as well as its employees to whom it
13 is reasonably necessary to disclose the information for this litigation;

14 5.2(c) Experts (as defined in this Protective Order) of the Receiving Party to
15 whom disclosure is reasonably necessary for this litigation and who have signed the
16 “Agreement to Be Bound by Protective Order” (attached as Exhibit A);

17 5.2(d) The Court and its personnel;

18 5.2(e) Court reporters, their staffs, and professional vendors to whom
19 disclosure is reasonably necessary for this litigation;

20 5.2(f) During their depositions, witnesses in the action to whom disclosure is
21 reasonably calculated to lead to discovery of admissible evidence. Pages of transcribed
22 deposition testimony or exhibits to depositions that contain Protected Material must be
23 separately bound by the court reporter and may not be disclosed to anyone except as
24 permitted under this Protective Order.

25 5.2(g) The author of or recipient of the Protected Material or the original
26 source of the information.

27 5.2(h) Professional vendors.

28 5.2(i) The Parties to this litigation and their current directors, officers and

1 employees to whom disclosure is reasonably necessary for this litigation.

2 5.2(j) Any mediators or arbitrators utilized in this litigation.

3 5.2(k) Witnesses who are being prepared by counsel to give testimony at a
4 deposition or at trial, or who are being examined by counsel at a deposition or at trial.

5 5.2(l) The Jury.

6 **6.0 Protected Material Subpoenaed Or Ordered Produced In Other**
7 **Litigation.**

8 If a Receiving Party is served with a subpoena or a Court order issued in other litigation that
9 would compel disclosure of any information or items designated in this action as “Confidential,” the
10 Receiving Party must immediately notify the Designating Party, in writing and in no event more than
11 five (5) court days after receiving the subpoena or Court order. Such notification must include a
12 copy of the subpoena or Court order. If Plaintiff is the Designating Party, notice shall be sent to
13 counsel for Plaintiff at Michael J. F. Smith, P.C., 1391 West Shaw Ave., Suite D, Fresno, CA 93711.
14 If Defendant is the Designating Party, notice shall be sent to Hunton & Williams LLP, 500 South
15 Hope St., Suite 2000, Los Angeles, CA 90071.

16 The Receiving Party also must immediately inform in writing the Party who caused the
17 subpoena or order to issue in the other litigation that some or all the Protected Material covered by
18 the subpoena or order is the subject of this Protective Order. In addition, the Receiving Party must
19 deliver a copy of this Protective Order promptly to the Party in the other action that caused the
20 subpoena or order to issue.

21 The purpose of imposing these duties is to alert the interested parties to the existence of this
22 Protective Order and to afford the Designating Party in this case an opportunity to try to protect its
23 confidentiality interests in the Court from which the subpoena or order issued. The Designating
24 Party shall bear the burdens and the expenses of seeking protection in that court of its Protected
25 Material – and nothing in these provisions should be construed as authorizing or encouraging a
26 Receiving Party in this action to disobey a lawful directive from another Court.

27 **7.0 Unauthorized Disclosure Of Protected Material.**

28 If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected

1 Material to any person or in any circumstance not authorized under this Protective Order, the
2 Receiving Party must immediately (a) notify in writing the Designating Party of the unauthorized
3 disclosures, (b) use its best efforts to retrieve all copies of the Protected Material, (c) inform the
4 person or persons to whom unauthorized disclosures were made of all the terms of this Order, and
5 (d) request such person or persons to execute the “Acknowledgment and Agreement to Be Bound”
6 (attached as Exhibit A).

7 **8.0 Filing Protected Material.**

8 In the event that counsel for any party desires to file with the Court any document which
9 includes any Protected Material, an application to file such document(s) under seal shall be filed
10 pursuant to the relevant Local Rules. This Section shall not apply to the Parties’ submission of
11 exhibits in connection with a hearing or for trial, nor the handling of exhibits during the hearing or
12 trial, without further order of the Court.

13 **9.0 Final Disposition.**

14 Unless otherwise ordered or agreed in writing by the Designating Party, after the final
15 termination of this litigation, including any appeals, if a Designating Party requests in writing the
16 return or destruction of any or all of its Protected Material to the Receiving Party, within thirty (30)
17 days of such request, the Receiving Party must submit a written certification, under penalty of
18 perjury, to the Designating Party that all Protected Material was returned or destroyed, including any
19 copies, abstracts, compilations, summaries or other forms of reproducing or capturing any of the
20 Protected Material. Notwithstanding this provision, Outside Counsel may retain an archival set of
21 copies of Protected Material. Any such archival copies that contain or constitute Protected Material
22 remain subject to this Protective Order.

23 **10.0 Inadvertent Production of Privileged Documents.**

24 Inadvertent production of any document or information that a Party later claims should not
25 have been produced because of a privilege, including but not limited to attorney-client or work
26 product privilege (“Inadvertently Produced Privileged Document”), will not be deemed to waive any
27 privilege. A Party may request the return of any Inadvertently Produced Privileged Document. A
28 request for the return of an Inadvertently Produced Privileged Document shall identify the document

1 inadvertently produced and the basis for withholding such document from production. If a Party
2 requests the return, pursuant to this paragraph, of any Inadvertently Produced Privileged Document
3 then in the custody of another party, the possessing party shall within three (3) days return to the
4 requesting Party the Inadvertently Produced Privileged Document and all copies thereof and shall
5 not make use of such documents or information in this proceeding or otherwise. The Party returning
6 such material may then move the Court for an order compelling production of the documents or
7 information, but said party shall not assert as a ground for entering such an order the fact or
8 circumstances of the inadvertent production.

9 **11.0 Miscellaneous.**

10 11.1 Right to Further Relief: Nothing in this Protective Order abridges the right of
11 any person to seek its modification by the Court in the future.

12 11.2 Right to Assert Other Objections: By stipulating to the entry of this Protective
13 Order, no Party waives any right it otherwise would have to object to producing any Disclosures or
14 Discovery Material on any ground not addressed in this Protective Order. Similarly, no Party waives

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1 any right to object on any ground to use in evidence of any of the Disclosures or Discovery Material
2 covered by this Protective Order.

3 **IT IS SO STIPULATED.**

4
5 DATED: November 21, 2013

MICHAEL J. F. SMITH, P.C.

6 By: /s/ John L. Migliazzo
7 John L. Migliazzo
8 Attorney for Plaintiff
9 ROBERT HENLEY
(authorizing e-filing by Emily L. Aldrich)

10 DATED: November 21, 2013

HUNTON & WILLIAMS LLP

11 By: /s/ Emily L. Aldrich
12 EMILY BURKHARDT VICENTE
13 EMILY L. ALDRICH
14 Attorney for Defendant
LOWE'S HIW, INC.

15 IT IS SO ORDERED

16 DATED: November 22, 2013


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UNITED STATES MAGISTRATE JUDGE