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11 **UNITED STATES DISTRICT COURT**
12 **EASTERN DISTRICT OF CALIFORNIA**

13 KEITH KOMARNICKI, on behalf of himself) Case No. 1:16-cv-01602-DAD-SKO
14 and all others similarly situated,)
15 Plaintiffs,) **STIPULATED PROTECTIVE**
16 v.) **ORDER AND CLAWBACK**
17 LINKUS ENTERPRISES, LLC, DISH) **AGREEMENT ORDER**
18 NETWORK LLC, DISH NETWORK) **(Doc. 58)**
19 CALIFORNIA SERVICE)
20 CORPORATION, and DOES 1-50, inclusive,)
21 Defendants.)
22 _____)

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18 **DISH NETWORK LLC**
and **DISH NETWORK CALIFORNIA SERVICE**
19 **CORPORATION**

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1 **STIPULATION**

2 Plaintiff Keith Komarnicki and Defendants Linkus Enterprises, LLC, Dish
3 Network, LLC and Dish Network Service Corporation (collectively “Defendants”) (Plaintiff and
4 Defendants collectively the “Parties”), acting through their respective counsel of record, hereby
5 stipulate as follows:

6 To expedite the production of discovery material, to facilitate the prompt
7 resolution of disputes over confidentiality of discovery material, to adequately protect
8 information the parties are entitled to keep confidential, to ensure that only the materials the
9 parties are entitled to keep confidential are subject to such treatment, and to ensure that the parties
10 are permitted reasonable necessary use of confidential discovery material in preparation for and
11 in the conduct of this litigation, pursuant to FRCP 26 and Local Rule 141.1, the parties request
12 that the Court enter the following Protective Order and Clawback Agreement in this action:

13 **PROTECTIVE ORDER AND CLAWBACK AGREEMENT FOR TREATMENT**
14 **OF CONFIDENTIAL INFORMATION**

15 1. **INFORMATION SUBJECT TO THIS ORDER**

16 a. Protected Information Generally

17 1) All documents, electronically stored information, tangible things, physical
18 objects, written discovery responses, testimony, or other information produced by the producing
19 party in this litigation is considered “Discovery Material.” This Order applies not only to
20 Discovery Material produced in this litigation, but also to any information copied or extracted
21 therefrom or otherwise reflecting Protected Information, in any form. Any Discovery Material
22 containing or including confidential information may be designated as such by the producing
23 party by marking it “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’
24 EYES ONLY,” and shall be treated in accordance with the terms of this Order. Each of the
25 identified categories of confidential Discovery Material shall be identified collectively in this
26 Order as “Protected Information.”

27 2) All Protected Information not reduced to documentary, electronic, tangible
28 or physical form, or which cannot be conveniently designated as set forth in paragraph I.A.1 or

1 pursuant to another confidentiality designation set forth in this Order, shall be designated by the
2 producing party by informing the receiving party of the designation in writing.

3 3) Any Protected Information that is obtained by any party from any person
4 pursuant to discovery in this litigation shall be used solely for purposes of this litigation.

5 4) Nothing in this Order shall limit any producing party's use or disclosure of
6 its own Protected Information.

7 5) The following Discovery Material is not Protected Information:

8 (A) Any Discovery Material that is or, after its disclosure to a receiving
9 party, becomes part of the public domain as a result of publication not involving a violation of
10 this Order or other obligation to maintain the confidentiality of such material;

11 (B) Any Discovery Material that the receiving party can show was
12 already publicly known prior to the disclosure; and,

13 (C) Any Discovery Material that the receiving party can show by
14 written records was received by it from an alternate source that obtained the material lawfully and
15 under no obligation of confidentiality to the producing party.

16 b. Protected Information Designated CONFIDENTIAL

17 1) For purposes of this Order, Protected Information designated
18 CONFIDENTIAL shall mean all Discovery Material produced for or disclosed in connection with
19 this action to a receiving party that a producing party considers to comprise confidential or
20 commercially sensitive technical, sales, marketing, personal, medical, or financial information of
21 the producing party (including any party to this action and any non-party producing information
22 or material voluntarily or pursuant to a subpoena or a court order in connection with this action),
23 or information that the producing party is under a legal obligation to maintain as confidential.

24 2) Protected Information designated CONFIDENTIAL and the contents
25 therein shall be available only to:

26 (A) Litigation counsel of record and supporting personnel employed in
27 the law firm(s) of litigation counsel of record, such as attorneys, paralegals, legal translators, legal
28 secretaries, law clerks, project managers and litigation support personnel;

1 (B) The parties and those officers, directors, and employees to whom
2 disclosure is reasonably necessary for this litigation, and supporting personnel employed by the
3 legal department of any party to this litigation;

4 (C) Technical Advisors and their necessary support personnel engaged
5 by counsel of record for the parties, subject to the provisions of section III herein, and provided
6 that such individuals have first been given a copy of this Order and have executed the
7 Confidentiality Agreement attached hereto as Attachment A. The term "Technical Advisor" shall
8 mean independent outside technical expert witnesses, consulting experts, or technical consultants
9 (none of whom are employees) retained by counsel of record for the parties who are deemed
10 reasonably necessary to assist such counsel in connection with this litigation;

11 (D) Independent contractors engaged by counsel of record for the
12 parties, to the extent reasonably necessary to assist counsel in connection such counsel in
13 connection with this litigation, including but not limited to (i) legal translators retained to
14 translate in connection with this action; (ii) independent stenographic reporters and videographers
15 retained to record and transcribe testimony in connection with this action; (iii) graphics or design
16 services retained by counsel for purposes of preparing demonstrative or other exhibits for
17 deposition, trial, or other court proceedings in the actions; (iv) non-technical jury or trial
18 consulting services not including mock jurors; (v) electronic discovery vendors retained to assist
19 with the organization and management of electronic discovery; and (vi) private investigators,
20 provided that such persons or entities have first been given a copy of this Order and either have
21 executed the Confidentiality Agreement attached hereto as Attachment A, and a signed copy has
22 been provided to the producing party, or are contractually bound to adhere to the terms of this
23 Order;

24 (E) Any fact witness during the course of a deposition subject to the
25 provisions of section V herein; and

26 (F) The Court, its personnel, and any other person (such as a master or
27 mediator) who serves in a judicial or quasi-judicial function, professional stenographic reporters
28 engaged to transcribe testimony (under seal or with other suitable precautions determined by the

1 Court), and jurors.

2 c. Protected Information Designated HIGHLY CONFIDENTIAL - ATTORNEYS'
3 EYES ONLY

4 1) For purposes of this Order, Protected Information designated HIGHLY
5 CONFIDENTIAL – ATTORNEYS’ EYES ONLY shall mean Protected Information that
6 contains extremely sensitive information. Protected Information designated HIGHLY
7 CONFIDENTIAL – ATTORNEYS’ EYES ONLY includes, but is not limited to: (i) marketing,
8 financial, sales, web traffic, research and development, or technical, data or information;
9 (ii) commercially sensitive competitive information, including, without limitation, information
10 obtained from a nonparty pursuant to a current Nondisclosure Agreement (“NDA”);
11 (iii) information or data relating to future products not yet commercially released and/or strategic
12 plans; (iv) trade secret, or other confidential research and development information; and,
13 (v) commercial agreements, settlement agreements or settlement communications, the disclosure
14 of which is likely to cause harm to the competitive position of the producing party.

15 2) Protected Information designated HIGHLY CONFIDENTIAL -
16 ATTORNEYS’ EYES ONLY and the contents therein shall be available only to:

17 (A) Litigation counsel of record and supporting personnel employed in
18 the law firm(s) of litigation counsel of record, such as attorneys, paralegals, legal translators, legal
19 secretaries, law clerks, project managers and litigation support personnel to whom it is reasonably
20 necessary to disclose the information;

21 (B) Up to three in-house counsel of any party with responsibility for
22 managing this litigation, who are members of at least one state bar in good standing and
23 supporting personnel employed by the legal department of any party to this litigation;

24 (C) Technical Advisors and their necessary support personnel engaged
25 by counsel of record for the parties, subject to the provisions of section III herein, and provided
26 that such individuals have first been given a copy of this Order and have executed the
27 Confidentiality Agreement attached hereto as Attachment A;

28 (D) Independent contractors engaged by counsel of record for the

1 parties, to the extent reasonably necessary to assist such counsel in connection with this litigation,
2 including but not limited to (i) legal translators retained to translate in connection with this action;
3 (ii) independent stenographic reporters and videographers retained to record and transcribe
4 testimony in connection with this action; (iii) graphics or design services retained by counsel for
5 purposes of preparing demonstrative or other exhibits for deposition, trial, or other court
6 proceedings in the actions; (iv) non-technical jury or trial consulting services not including mock
7 jurors; (v) electronic discovery vendors retained to assist with the organization and management
8 of electronic discovery; and (vi) private investigators, provided that such persons or entities have
9 first been given a copy of this Order and have executed the Confidentiality Agreement attached
10 hereto as Attachment A, and a signed copy has been provided to the producing party, or are
11 contractually bound to adhere to the terms of this Order;

12 (E) Fact witnesses only in accordance with the provisions of section V
13 herein;

14 (F) The Court, its personnel, and any other person (such as a master or
15 mediator) who serves in a judicial or quasi-judicial function, professional stenographic reporters
16 engaged to transcribe testimony (under seal or with other suitable precautions determined by the
17 Court), and jurors;

18 3) In determining whether Protected Information should be designated as
19 HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY, each party agrees to use such
20 designation only in good faith.

21 **2. USE OF PROTECTED INFORMATION AT HEARING OR TRIAL**

22 In the event that a party intends to use any Protected Information during any
23 hearing or trial, that party shall provide a minimum of two (2) business days’ notice to the
24 producing party. Subject to challenges under section IV, the parties will not oppose any
25 reasonable request by the producing party that Protected Information be sealed, if allowed by the
26 Court, during the presentation of any testimony, evidence, or argument relating to or involving
27 the use of any Protected Information.
28

1 **3. TECHNICAL ADVISORS**

2 a. Purpose

3 Protected Information designated by the producing party and such copies of Protected
4 Information as are reasonably necessary for maintaining, defending, or evaluating this litigation
5 may be furnished and disclosed to the receiving party's Technical Advisors and their necessary
6 support personnel.

7 b. No Disclosure Without Protective Order Subscription

8 No disclosure of Protected Information to a Technical Advisor or their necessary support
9 personnel shall occur until that person has signed the Confidentiality Agreement attached hereto
10 as Attachment A.

11 **4. CHALLENGES TO CONFIDENTIALITY DESIGNATIONS**

12 a. Use of Reasonable Care and No Waiver

13 The parties shall use reasonable care when designating Protected Information. Nothing in
14 this Order shall prevent a receiving party from contending that any Protected Information has
15 been improperly designated. A receiving party may at any time request that the producing party
16 cancel or modify the Protected Information designation with respect to any document or any
17 information contained therein.

18 b. Objections to Confidentiality Designations

19 A party shall not be obligated to challenge the propriety of a designation of any category
20 of Protected Information at the time of production, and a failure to do so shall not preclude a
21 subsequent challenge thereto. In the event that a party objects to the designation of Protected
22 Information, such a challenge shall be in writing, shall be served on counsel for the producing
23 party, and shall particularly identify the Protected Information that the receiving party contends
24 should be differently designated. The parties shall use their best efforts to resolve promptly and
25 informally such disputes and shall advise one another of both the factual and legal basis for their
26 respective positions. If an agreement cannot be reached, the receiving party shall request that the
27 Court cancel or modify a designation. The burden of demonstrating the confidential nature of
28 Protected Information shall at all times be and remain on the designating party.

1 c. Treatment of Protected Information During Challenge to a Designation

2 Unless otherwise resolved by agreement between the parties, until a determination by the
3 Court, the Protected Information at issue shall be treated as having been properly designated and
4 subject to the terms of this Order.

5 **5. LIMITATIONS ON THE USE OF PROTECTED INFORMATION**

6 a. Restrictions on Use of Protected Information

7 All Protected Information shall be held in confidence by each person to whom it is
8 disclosed, shall be used only for purposes of this litigation, shall not be used for any business
9 purpose or in connection with any other legal proceeding, and shall not be disclosed to any person
10 who is not entitled to receive such Protected Information as herein provided. All produced
11 Protected Information shall be carefully maintained so as to preclude access by persons who are
12 not entitled to receive such Protected Information.

13 b. Examinations and Court Filings Concerning Protected Information

14 Except as may be otherwise ordered by the Court, any person may be examined as
15 a witness at depositions and trial and may testify concerning all Protected Information of which
16 such person has prior personal knowledge. Without in any way limiting the generality of the
17 foregoing:

18 1) A present director, officer, and/or employee of a producing party may be
19 examined and may testify concerning all Protected Information which has been produced by that
20 party and of which the witness has personal knowledge;

21 2) A former director, officer, agent and/or employee of a producing party may
22 be interviewed, examined and may testify concerning all Protected Information of which he or
23 she has personal knowledge, including any Protected Information that refers to matters of which
24 the witness has personal knowledge, which has been produced by that party and which pertains to
25 the period or periods of his or her employment; and

26 3) Non-parties may be examined or testify concerning any Protected
27 Information of a producing party, which appears on its face or from other documents or testimony
28 to have been received from or communicated to the non-party as a result of any contact or

1 relationship with the producing party or a representative of the producing party. Any person
2 other than the witness, his or her attorney(s), or any person qualified to receive Protected
3 Information under this Order shall be excluded from the portion of the examination concerning
4 such Protected Information, unless the producing party consents to persons other than qualified
5 recipients being present at the examination. If the witness is represented by an attorney who is
6 not qualified under this Order to receive such Protected Information, then prior to the
7 examination, the attorney must provide a signed agreement, in the form of Attachment A hereto,
8 that he or she will comply with the terms of this Order and maintain the confidentiality of
9 Protected Information disclosed during the course of the examination. In the event that such
10 attorney declines to sign such a statement prior to the examination, the parties, by their attorneys,
11 shall jointly seek a protective order from the Court prohibiting the attorney from disclosing
12 Protected Information.

13 4) Every fact witness shall be informed, prior to being presented with the
14 documents designated as Protected Information in this litigation, that he or she may be shown
15 documents designated as Protected Information in this litigation, and that such Protected
16 Information and the contents therein are being furnished to the witness solely for use in this
17 litigation. Every fact witness shall be shown a copy of this Order. No fact witness may retain
18 any material designated as Protected Information.

19 5) All transcripts of depositions, exhibits, answers to interrogatories,
20 pleadings, briefs, and other documents submitted to the Court that have been designated as
21 Protected Information, or which contain information so designated, shall have only the portions
22 with the information designated as Protected Information be filed under seal in a manner
23 prescribed by the Court for such filings unless the Court orders otherwise. To avoid unnecessary
24 sealing of Court records and motion practice relating to sealed filings, any party preparing a filing
25 with the Court that may contain Protected Information may identify to the producing party or
26 non-party the specific Protected Information at issue and request a waiver of the confidentiality
27 protections for that specific Protected Information. Upon receipt of such a request to waive
28 confidentiality protections, the producing party or non-party shall respond in good faith within

1 two (2) business days.

2 6) Litigation attorneys of record for the parties are hereby authorized to be the
3 persons who may retrieve confidential exhibits and/or other confidential matters filed with the
4 Court upon termination of this litigation without further order of this Court, and are the persons to
5 whom such confidential exhibits or other confidential matters may be returned by the Clerk of the
6 Court, if they are not so retrieved. No material or copies thereof so filed shall be released, except
7 by order of the Court, to litigation counsel of record, or as otherwise provided for hereunder.

8 7) Protected Information shall not be copied or otherwise produced by a
9 receiving party, except for transmission to qualified recipients, without the written permission of
10 the producing party, or, in the alternative, by further order of the Court. Nothing herein shall,
11 however, restrict a qualified recipient from making working copies, abstracts, digests and
12 analyses of Protected Information for use in connection with this litigation, and such working
13 copies, abstracts, digests and analyses also shall be deemed Protected Information under the terms
14 of this Order. Further, nothing herein shall restrict a qualified recipient from converting or
15 translating Protected Information into machine-readable form for incorporation into a data
16 retrieval system used in connection with this action, provided that access to that Protected
17 Information, in whatever form stored or reproduced, shall be limited to qualified recipients.

18 8) Testimony given at deposition may be designated as Protected Information
19 by outside litigation counsel of record by making a statement orally to that effect on the record at
20 any time during the deposition. Within fifteen (15) business days of receipt of the final certified
21 transcript of any deposition, the producing party may request that the original and all copies of the
22 deposition transcript, in whole or in part, be marked with an appropriate confidentiality
23 designation. Confidentiality designations shall be made by notifying all parties in writing of the
24 specific pages and lines of the transcript that should be treated as Protected Information.
25 Deposition transcripts shall be treated by default as CONFIDENTIAL until the expiration of the
26 time to make a confidentiality designation unless otherwise agreed to by the parties. Any
27 portions so designated shall thereafter be treated in accordance with the terms of this Order.
28 Objections to confidentiality designations under this paragraph shall be governed by the

1 procedure set forth in section IV above.

2 c. Unauthorized Disclosure of Protected Information

3 If a receiving party learns that, by inadvertence or otherwise, it has disclosed
4 Protected Information to any person or in any circumstance not authorized under this Order, the
5 receiving party must immediately: (i) notify in writing the producing party of the unauthorized
6 disclosure(s); (ii) use its best efforts to retrieve all copies of the Protected Information; (c) inform
7 the person or persons to whom unauthorized disclosures were made of all the terms of this Order;
8 and (d) request that such person or persons execute the Confidentiality Agreement attached hereto
9 as Attachment A. Compliance with this paragraph upon the discovery of an unauthorized
10 disclosure of Protected Information is mandatory and shall not excuse a violation of this Order or
11 exempt a violating party from sanctions pursuant to paragraph D below.

12 d. Violations

13 If any party violates the limitations on the use of Protected Information as
14 described above, the party violating this Order may be subject to sanctions if ordered by the
15 Court. In the event motion practice is required to enforce the terms of this Order, the prevailing
16 party on such a motion shall be awarded costs, expenses, and fees, including attorney or other
17 professional fees, incurred in connection with the discovery of the violation and the preparation,
18 filing, and arguing of the motion or any other proceedings resulting from the violation. Prior to
19 the filing of any motion, the Parties must first meet and confer regarding any purported violation
20 as described above, and give the opposing party at least 5 (five) business days after the meet and
21 confer to correct any potential violation. However, the requirement to wait 5 (five) days before
22 seeking relief with the Court shall not apply to requests for *ex parte* relief. No party shall be
23 entitled to seek sanctions, costs, expenses, fees (attorney or other professional) incurred in
24 connection with the discovery of the violation and the preparation, filing, and arguing of the
25 motion or any other proceedings resulting from the violation unless the offending party has been
26 afforded at least five (5) business days to cure the violation, and the offending party fails to so
27 cure by the expiration of that time.

1 **6. NON-PARTY USE OF THIS PROTECTIVE ORDER AND CLAWBACK**
2 **AGREEMENT**

3 a. Purpose

4 A non-party producing Discovery Material voluntarily or pursuant to a subpoena
5 or a court order may designate such Discovery Material as Protected Information pursuant to the
6 terms of this Protective Order and Clawback Agreement.

7 b. Non-Party Access

8 A non-party's use of this Protective Order and Clawback Agreement to protect its
9 Protected Information does not entitle that non-party access to the Protected Information
10 produced by any party or non-party in this case.

11 **7. NO WAIVER OF PRIVILEGE**

12 When a producing party gives notice to receiving parties that certain inadvertently
13 produced material is subject to a claim of privilege or other protection, the obligations of the
14 receiving parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B). This provision
15 is not intended to modify whatever procedure may be established in an e-discovery order that
16 provides for production without prior privilege review. Pursuant to Federal Rule of Evidence
17 502(d) and (e), insofar as the parties reach an agreement on the effect of disclosure of a
18 communication or information covered by the attorney-client privilege or work product
19 protection, the parties may incorporate their agreement in the stipulated protective order
20 submitted to the court as set forth in Section 9 below (the "Clawback Agreement").

21 **8. MISCELLANEOUS PROVISIONS**

22 a. Waiver

23 Any of the notice requirements herein may be waived, in whole or in part, but only
24 in writing signed by the attorney-in-charge for the party against whom such waiver will be
25 effective.

26 b. Inadvertent or Unintentional Production of Protected Information

27 Inadvertent or unintentional production of documents or things containing
28 Protected Information which are not designated as one or more categories of Protected

1 Information at the time of production shall not be deemed a waiver in whole or in part of a claim
2 for confidential treatment. With respect to documents, the producing party shall immediately
3 upon discovery notify the other parties of the error in writing and provide replacement pages
4 bearing the appropriate confidentiality legend. In the event of any disclosure of Protected
5 Information other than in a manner authorized by this Protective Order and Clawback Agreement,
6 including any unintentional or inadvertent disclosure, counsel for the party responsible for the
7 disclosure shall immediately notify opposing counsel of all of the pertinent facts, and make every
8 effort to further prevent unauthorized disclosure including, retrieving all copies of the Protected
9 Information from the recipient(s) thereof, and securing the agreement of the recipients not to
10 further disseminate the Protected Information in any form. Compliance with the foregoing shall
11 not prevent the producing party from seeking further relief from the Court.

12 c. Conclusion of Litigation

13 1) Within sixty (60) business days after the entry of a final non-appealable
14 judgment or order, or the expiration of the deadline for any party to appeal any final judgment or
15 order, or the complete settlement of all claims asserted against all parties in this action, each party
16 shall, at the option of the producing party, either return or destroy all physical objects and
17 documents which embody Protected Information it has received, and shall destroy in whatever
18 form stored or reproduced, all physical objects and documents, including but not limited to,
19 email, correspondence, memoranda, notes and other work product materials, which contain or
20 refer to any category of Protected Information. All Protected Information not embodied in
21 physical objects and documents shall remain subject to this Order.

22 2) In the event that a party is dismissed before the entry of a final non-
23 appealable judgment or order, this same procedure shall apply to any Protected Information
24 received from or produced to the dismissed party.

25 3) Notwithstanding this provision, litigation counsel of record are not required
26 to delete Protected Information that may reside on their respective firm's electronic back-up
27 systems that are over-written in the normal course of business. Notwithstanding the foregoing,
28 litigation counsel of record shall be entitled to maintain electronic copies of all pleadings, motions

1 and trial briefs (including all supporting and opposing papers and exhibits thereto), written
2 discovery requests and responses (and exhibits thereto), deposition transcripts (and exhibits
3 thereto), trial transcripts, and exhibits offered or introduced into evidence at any hearing or trial,
4 and their attorney work product, which refers or is related to any Protected Information for
5 archival purposes only.

6 4) If the producing party requests that Protected Information be destroyed, the
7 receiving party must provide a certificate of destruction to the producing party.

8 d. Subpoenas

9 If at any time documents containing Protected Information are subpoenaed by any
10 court, arbitral, administrative or legislative body, or are otherwise requested in discovery, the
11 person to whom the subpoena or other request is directed shall give written notice within three (3)
12 business days thereof to every party or non-party who has produced such documents and to its
13 counsel, and shall provide each such party with an opportunity to object to the production of such
14 documents. If a producing party does not take steps to prevent disclosure of such documents
15 within ten (10) business days of the date written notice is given, the party to whom the referenced
16 subpoena is directed may produce such documents in response thereto, but shall take all
17 reasonable measures to have such documents treated in accordance with terms of this Protective
18 Order and Clawback Agreement.

19 e. Post-Filing Communications

20 No party shall be required to identify on their respective privilege log any
21 communication between the party and its attorneys dated on or after the filing of the lawsuit that
22 specifically concerns this lawsuit, which absent this provision, the party would have been
23 obligated to so identify on said privilege log. The parties shall exchange their respective privilege
24 document logs at a time to be agreed upon by the parties following the production of documents.

25 f. Modification of Protections

26 This Order is entered without prejudice to the right of any party, either by
27 agreement with other parties to this action, or by applying to the Court if agreement cannot be
28 reached among parties, to extend additional protection, or to reduce or rescind the restrictions of

1 this Order, when convenience or necessity requires. Furthermore, without application to the
2 Court, any party that is a beneficiary of the protections of this Order may enter a written
3 agreement releasing any other party hereto from one or more requirements of this Order even if
4 the conduct subject to the release would otherwise violate the terms herein.

5 g. No Agreement Concerning Discoverability

6 The identification or agreed upon treatment of certain types of Discovery Material
7 does not reflect agreement by the parties that the disclosure of such categories of Discovery
8 Material is required or appropriate in this action. The parties reserve the right to argue that any
9 particular category of Discovery Material should not be produced.

10 h. No Limitation on Legal Representation

11 Nothing in this Protective Order shall preclude or impede litigation counsel of
12 record's ability to communicate with or advise their client in connection with this litigation based
13 on such counsel's review and evaluation of Protected Information, provided however, that such
14 communications or advice shall not disclose or reveal the substance or content of any Protected
15 Information other than as permitted under this Protective Order.

16 i. Agreement Upon Execution

17 Each of the parties agrees to be bound by the terms of this Protective Order as of
18 the date counsel for such party executes this Protective Order, even if prior to entry of this order
19 by the Court.

20 j. Interpretation, Enforcement and Continuing Jurisdiction

21 The United States District Court, Eastern District of California is responsible for
22 the interpretation and enforcement of this Protective Order. After termination of this litigation,
23 the provisions of this Protective Order shall continue to be binding except with respect to that
24 Discovery Material that becomes a matter of public record. This Court retains and shall have
25 continuing jurisdiction over the parties and recipients of the Protected Information for
26 enforcement of the provision of this Protective Order following termination of this litigation. All
27 disputes concerning Protected Information produced under the protection of this Protective Order
28 shall be resolved by the United States District Court, Eastern District of California.

1 **9. CLAWBACK AGREEMENT**

2 Pursuant to FRE 502(d) and (e), the Parties agree to and the Court orders protection of privileged
3 and otherwise protected documents against claims of waiver (including as against third parties
4 and in other federal and state proceedings) as follows:

5 (a) The disclosure or production of documents by a Producing Party subject to a
6 legally recognized claim of privilege, including without limitation the attorney-client privilege
7 and the work-product doctrine, to a Receiving Party, shall in no way constitute the voluntary
8 disclosure of such document.

9 (b) The inadvertent disclosure or production of any document in this action shall not
10 result in the waiver of any privilege, associated with such document as to the Receiving Party or
11 any third parties, and shall not result in any waiver, including subject matter waiver, of any kind.

12 (c) If, within thirty (30) days of the date of production of the Documents, the
13 Producing Party determines that any document produced by the Producing Party is subject to a
14 legally recognizable privilege (“Protected Document”):

- 15 i. the Producing Party shall: (A) immediately notify the Receiving Party in
16 writing that it has discovered documents believed to be privileged or
17 protected; (B) specifically identify the Protected Documents by Bates
18 number range or hash value, and, (C) within ten (10) days of receiving
19 confirmation by the Producing Party that documents are privileged or
20 protected by the Receiving party, the Producing Party shall request that the
21 Receiving Party, return, sequester, or destroy all copies of such Protected
22 Documents, along with any notes, abstracts or compilations of the content
23 thereof. The Parties shall meet and confer as to whether the Documents are
24 in fact Protected Documents. If the Parties agree that the Documents are in
25 fact Protected Documents, and if the Protected Documents have been
26 loaded into a litigation review database under the control of the Receiving
27 Party, the Receiving Party shall have all electronic copies of the Protected
28 Documents extracted from the database and return, sequester, or destroy

1 the Protected Documents and any copies, along with any notes, abstracts or
2 compilations of the content thereof. Where such Protected Documents
3 cannot be destroyed or separated, they shall not be reviewed, disclosed, or
4 otherwise used by the Receiving Party. Notwithstanding, the Receiving
5 Party is under no obligation to search or review the Producing Party's
6 documents to identify potentially privileged or work product Protected
7 Documents.

8 ii. If the Producing Party intends to assert a claim of privilege over documents
9 identified by the Producing Party as Protected Documents, the Producing
10 Party will inform the Receiving Party of such intention in writing and shall
11 provide the Receiving Party with a log for such Protected Documents that
12 is consistent with the requirements of the Federal Rules of Civil Procedure
13 26(b)(5), setting forth the basis for the claim of privilege. If any portion of
14 a Protected Document does not contain privileged information, the
15 Producing Party shall also provide to the Receiving Party a redacted copy
16 of the document that omits the information that the Producing Party claims
17 is subject to a claim of privilege.

18 (d) If, within thirty (30) days of the date of production of the Documents, the
19 Producing Party determines it has produced a Protected Document:

20 i. the Producing Party may notify the Receiving Party of such inadvertent
21 production in writing, and demand the return of such documents. Such
22 notice shall be in writing. However, any written notice must be delivered
23 ten (10) days prior to a deposition or trial. The Producing Party's written
24 notice will identify the Protected Document inadvertently produced by
25 bates number range or hash value, the privilege claimed, and the basis for
26 the assertion of the privilege and shall provide the Receiving Party with a
27 log for such Protected Documents that is consistent with the requirements
28 of the Federal Rules of Civil Procedure 26(b)(5), setting forth the basis for

1 the claim of privilege. If any portion of the Protected Document does not
2 contain privileged information, the Producing Party shall also provide to
3 the Receiving Party a redacted copy of the Document that omits the
4 information that the Producing Party believes is subject to a claim of
5 privilege.

6 ii. Within ten (10) days of receiving the Producing Party's written notification
7 described above, the Producing Party shall request that the Receiving Party
8 return, sequester, or destroy the Protected Document and any copies, along
9 with any notes, abstracts or compilations of the content thereof. The
10 Parties shall meet and confer as to whether the Documents are in fact
11 Protected Documents. If the Parties agree that the Documents are in fact
12 Protected Documents, and if the Protected Documents have been loaded
13 into a litigation review database under the control of the Receiving Party,
14 the Receiving Party shall have all electronic copies of the Protected
15 Documents extracted from the database and return, sequester, or destroy
16 the Protected Documents and any copies, along with any notes, abstracts or
17 compilations of the contact thereof.

18 (e) If the information contained in a Protected Document has already been used in or
19 described in other documents generated or maintained by the Receiving Party prior to the date of
20 receipt of written notice by the Producing Party, then the Receiving Party shall sequester such
21 documents until the claim has been resolved. If the Receiving Party disclosed the Protected
22 Document before being notified of its inadvertent production, it must take reasonable steps to
23 retrieve it.

24 (f) The Receiving Party's return, sequestering or destruction of Protected Documents
25 as provided herein will not act as a waiver of the Requesting Party's right to move for the
26 production of the returned, sequestered or destroyed documents on the grounds that the
27 documents are not, in fact, subject to a viable claim of privilege. However, the Receiving Party is
28 prohibited and estopped from arguing that:

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- i. the disclosure or production of the Protected Documents acts as a waiver of an applicable privilege;
- ii. the disclosure of the Protected Documents was not inadvertent;
- iii. the Producing Party did not take reasonable steps to prevent the disclosure of the Protected Documents; or
- iv. the Producing Party failed to take reasonable or timely steps to rectify the error pursuant to the Federal Rules of Civil Procedure, or otherwise.

(g) Either party may submit Protected Documents to the Court under seal for a determination of the claim of privilege. The Producing Party shall preserve the Protected Documents until such claim is resolved. The Receiving Party may not use the Protected Documents that were submitted to the Court under seal for determination of the claim of privilege for any purpose absent this Court’s order.

(h) Upon a determination by the Court that the Protected Documents are protected by the applicable privilege, and if the Protected Documents have been sequestered rather than returned or destroyed by the Receiving Party, the Protected Documents shall be returned or destroyed within 10 (ten) days of the Court’s order.

(i) By operation of the Parties’ agreement and Court Order, the Parties are specifically afforded the protections of FRE 502 (d) and (e).

(signatures on page 20)

UNITED STATES MAGISTRATE JUDGE

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EXHIBIT "A"

PROMISE OF CONFIDENTIALITY

I, _____, declare as follows:

1. My [business or residential] address is _____,
_____ and my present occupation is
_____.

2. I have received a copy of the **STIPULATED PROTECTIVE ORDER AND CLAWBACK AGREEMENT** regarding Confidential Discovery in the matter entitled *Keith Komarnicki v. Linkus Enterprises, LLC et al*, United States District Court, Eastern District of California, Case No. 1:16-cv-01602-DAD-SKO.

3. I will comply with all of the provisions of the **STIPULATED PROTECTIVE ORDER AND CLAWBACK AGREEMENT**. I will hold in confidence, will not disclose to anyone other than those persons specifically authorized by the **STIPULATED PROTECTIVE ORDER AND CLAWBACK AGREEMENT**, and will not copy or use except for purposes of the litigation, any documents or information designated "**Confidential**" or "**Highly Confidential – Attorneys Eyes’ Only.**"

4. I will return any materials received under this **STIPULATED PROTECTIVE ORDER AND CLAWBACK AGREEMENT** at the conclusion of the instant case, to the Party or its counsel who originally provided said materials to me.

5. I hereby stipulate to the jurisdiction of the United States District Court, Eastern District of California with regard to any proceeding to enforce the terms of the **STIPULATED PROTECTIVE ORDER AND CLAWBACK AGREEMENT** against me.

I declare under penalty of perjury under the laws of the State of California that the forgoing is true and correct and that this **PROMISE OF CONFIDENTIALITY** was executed on the _____ day of _____ in _____.
