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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA  
SACRAMENTO DIVISION

TROUTMAN SANDERS LLP  
5 PARK PLAZA  
SUITE 1400  
IRVINE, CA 92614-2545

SOFPOOL LLC, a limited liability  
company,

Plaintiff,

v.

KMART CORPORATION, a Michigan  
Corporation, BIG LOTS, INC., an Ohio  
Corporation, and BIG LOTS STORES,  
INC., an Ohio Corporation,

Defendants.

Case No. CV 10-03333 LKK JFM

**PROTECTIVE ORDER**

AND RELATED COUNTERCLAIMS.

STIPULATED AND [PROPOSED] PROTECTIVE ORDER

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1. PURPOSES AND LIMITATIONS

Disclosure and discovery activity in this action are likely to involve production of confidential, proprietary, or private information for which special protection from public disclosure and from use for any purpose other than prosecuting this litigation may be warranted. Accordingly, the parties hereby stipulate to and petition the court to enter the following Stipulated Protective Order. The parties acknowledge that this Order does not confer blanket protections on all disclosures or responses to discovery and that the protection it affords from public disclosure and use extends only to the limited information or items that are entitled to confidential treatment under the applicable legal principles. The parties further acknowledge, as set forth in Section 13.3, below, that this Stipulated Protective Order does not entitle them to file confidential information under seal; Civil Local Rule 141 sets forth the procedures that must be followed and the standards that will be applied when a party seeks permission from the court to file material under seal.

2. DEFINITIONS

2.1 Challenging Party: a Party or Non-Party that challenges the designation of information or items under this Order.

2.2 “CONFIDENTIAL” Information or Items: information (regardless of how it is generated, stored or maintained) or tangible things that qualify for protection under Federal Rule of Civil Procedure 26(c).

2.3 Counsel (without qualifier): Outside Counsel of Record and House Counsel (as well as their support staff).

2.4 Designating Party: a Party or Non-Party that designates information or items that it produces in disclosures or in responses to discovery as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”.

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

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2           2.6    Expert: a person with specialized knowledge or experience in a matter pertinent to  
3 the litigation who (1) has been retained by a Party or its counsel to serve as an expert witness or  
4 as a consultant in this action, (2) is not a past or current employee of a Party or of a Party’s  
5 competitor, and (3) at the time of retention, is not anticipated to become an employee of a Party  
6 or of a Party’s competitor.

7           2.7    “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” Information or  
8 Items: extremely sensitive “Confidential Information or Items,” disclosure of which to another  
9 Party or Non-Party would create a substantial risk of serious harm that could not be avoided by  
10 less restrictive means.

11           2.8    House Counsel: attorneys who are employees of a party to this action. House  
12 Counsel does not include Outside Counsel of Record or any other outside counsel.

13           2.9    Non-Party: any natural person, partnership, corporation, association, or other legal  
14 entity not named as a Party to this action.

15           2.10   Outside Counsel of Record: attorneys who are not employees of a party to this  
16 action but are retained to represent or advise a party to this action and have appeared in this action  
17 on behalf of that party or are affiliated with a law firm which has appeared on behalf of that party.

18           2.11   Party: any party to this action, including all of its officers, directors, employees,  
19 consultants, retained experts, and Outside Counsel of Record (and their support staffs).

20           2.12   Producing Party: a Party or Non-Party that produces Disclosure or Discovery  
21 Material in this action.

22           2.13   Professional Vendors: persons or entities that provide litigation support services  
23 (e.g., photocopying, videotaping, translating, preparing exhibits or demonstrations, and  
24 organizing, storing, or retrieving data in any form or medium) and their employees and  
25 subcontractors.

26           2.14   Protected Material: any Disclosure or Discovery Material that is designated as  
27 “CONFIDENTIAL,” or as “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.”

28           2.15   Receiving Party: a Party that receives Disclosure or Discovery Material from a  
Producing Party.

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3. SCOPE

The protections conferred by this Stipulation and Order cover not only Protected Material (as defined above), but also (1) any information copied or extracted from Protected Material; (2) all copies, excerpts, summaries, or compilations of Protected Material; and (3) any testimony, conversations, or presentations by Parties or their Counsel that might reveal Protected Material. However, the protections conferred by this Stipulation and Order do not cover the following information: (a) any information that is in the public domain at the time of disclosure to a Receiving Party or becomes part of the public domain after its disclosure to a Receiving Party as a result of publication not involving a violation of this Order, including becoming part of the public record through trial or otherwise; and (b) any information known to the Receiving Party prior to the disclosure or obtained by the Receiving Party after the disclosure from a source who obtained the information lawfully and under no obligation of confidentiality to the Designating Party. Any use of Protected Material at trial shall be governed by a separate agreement or order.

4. DURATION

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

5. DESIGNATING PROTECTED MATERIAL

5.1 Exercise of Restraint and Care in Designating Material for Protection. Each Party or Non-Party that designates information or items for protection under this Order must take care to limit any such designation to specific material that qualifies under the appropriate standards. To the extent it is practical to do so, the Designating Party must designate for protection only those parts of material, documents, items, or oral or written communications that qualify – so that

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2 other portions of the material, documents, items, or communications for which protection is not  
3 warranted are not swept unjustifiably within the ambit of this Order.

4 Mass, indiscriminate, or routinized designations are prohibited. Designations that are  
5 shown to be clearly unjustified or that have been made for an improper purpose (e.g., to  
6 unnecessarily encumber or retard the case development process or to impose unnecessary  
7 expenses and burdens on other parties) expose the Designating Party to sanctions.

8 If it comes to a Designating Party's attention that information or items that it designated  
9 for protection do not qualify for protection at all or do not qualify for the level of protection  
10 initially asserted, that Designating Party must promptly notify all other parties that it is  
11 withdrawing the mistaken designation.

12 5.2 Manner and Timing of Designations. Except as otherwise provided in this Order  
13 (see, e.g., second paragraph of section 5.2(a) below), or as otherwise stipulated or ordered,  
14 Disclosure or Discovery Material that qualifies for protection under this Order must be clearly so  
15 designated before the material is disclosed or produced.

16 Designation in conformity with this Order requires:

17 (a) for information in documentary form (e.g., paper or electronic documents, but  
18 excluding transcripts of depositions or other pretrial or trial proceedings), that the Producing  
19 Party affix the legend "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS'  
20 EYES ONLY" to each page that contains protected material. If only a portion or portions of the  
21 material on a page qualifies for protection, the Producing Party also must clearly identify the  
22 protected portion(s) (e.g., by making appropriate markings in the margins) and must specify, for  
23 each portion, the level of protection being asserted.

24 A Party or Non-Party that makes original documents or materials available for inspection  
25 need not designate them for protection until after the inspecting Party has indicated which  
26 material it would like copied and produced. During the inspection and before the designation, all  
27 of the material made available for inspection shall be deemed "HIGHLY CONFIDENTIAL –  
28 ATTORNEYS' EYES ONLY." After the inspecting Party has identified the documents it wants  
copied and produced, the Producing Party must determine which documents, or portions thereof,

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2 qualify for protection under this Order. Then, before producing the specified documents, the  
3 Producing Party must affix the appropriate legend (“CONFIDENTIAL” or “HIGHLY  
4 CONFIDENTIAL – ATTORNEYS’ EYES ONLY”) to each page that contains Protected  
5 Material. If only a portion or portions of the material on a page qualifies for protection, the  
6 Producing Party also must clearly identify the protected portion(s) (e.g., by making appropriate  
7 markings in the margins) and must specify, for each portion, the level of protection being  
8 asserted.

9 (b) for testimony given in deposition or in other pretrial or trial proceedings, that the  
10 Designating Party identify on the record, before the close of the deposition, hearing, or other  
11 proceeding, all protected testimony and specify the level of protection being asserted. When it is  
12 impractical to identify separately each portion of testimony that is entitled to protection and it  
13 appears that substantial portions of the testimony may qualify for protection, the Designating  
14 Party may invoke on the record (before the deposition, hearing, or other proceeding is concluded)  
15 a right to have up to 21 days to identify the specific portions of the testimony as to which  
16 protection is sought and to specify the level of protection being asserted. Only those portions of  
17 the testimony that are appropriately designated for protection within the 21 days shall be covered  
18 by the provisions of this Stipulated Protective Order. Alternatively, a Designating Party may  
19 specify, at the deposition or up to 21 days afterwards if that period is properly invoked, that the  
20 entire transcript shall be treated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL –  
21 ATTORNEYS’ EYES ONLY.”

22 Parties shall give the other parties notice if they reasonably expect a deposition, hearing or  
23 other proceeding to include Protected Material so that the other parties can ensure that only  
24 authorized individuals, including individuals who have signed the “Acknowledgment and  
25 Agreement to Be Bound” (Exhibit A), are present at those proceedings. The use of a document as  
26 an exhibit at a deposition shall not in any way affect its designation as “CONFIDENTIAL” or  
27 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.”

28 Transcripts containing Protected Material shall have an obvious legend on the title page  
that the transcript contains Protected Material, and the title page shall be followed by a list of all

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2 pages (including line numbers as appropriate) that have been designated as Protected Material and  
3 the level of protection being asserted by the Designating Party. The Designating Party shall  
4 inform the court reporter of these requirements. Any transcript that is prepared before the  
5 expiration of a 21-day period for designation shall be treated during that period as if it had been  
6 designated “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” in its entirety unless  
7 otherwise agreed. After the expiration of that period, the transcript shall be treated only as  
8 actually designated.

9 (c) for information produced in some form other than documentary and for any other  
10 tangible items, that the Producing Party affix in a prominent place on the exterior of the container  
11 or containers in which the information or item is stored the legend “CONFIDENTIAL” or  
12 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”. If only a portion or portions of  
13 the information or item warrant protection, the Producing Party, to the extent practicable, shall  
14 identify the protected portion(s) and specify the level of protection being asserted.

15 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to  
16 designate qualified information or items does not, standing alone, waive the Designating Party’s  
17 right to secure protection under this Order for such material. Upon timely correction of a  
18 designation, the Receiving Party must make reasonable efforts to assure that the material is  
19 treated in accordance with the provisions of this Order.

20 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

21 6.1 Timing of Challenges. Any Party or Non-Party may challenge a designation of  
22 confidentiality at any time. A Party does not waive its right to challenge a confidentiality  
23 designation by electing not to mount a challenge promptly after the original designation is  
24 disclosed.

25 6.2 Meet and Confer. The Challenging Party shall initiate the dispute resolution  
26 process by providing written notice of each designation it is challenging and describing the basis  
27 for each challenge. To avoid ambiguity as to whether a challenge has been made, the written  
28 notice must recite that the challenge to confidentiality is being made in accordance with this  
specific paragraph of the Protective Order. The parties shall attempt to resolve each challenge in

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2 good faith and must begin the process by conferring directly (in voice to voice dialogue; other  
3 forms of communication are not sufficient) within 14 days of the date of service of notice. In  
4 conferring, the Challenging Party must explain the basis for its belief that the confidentiality  
5 designation was not proper and must give the Designating Party an opportunity to review the  
6 designated material, to reconsider the circumstances, and, if no change in designation is offered,  
7 to explain the basis for the chosen designation. A Challenging Party may proceed to the next  
8 stage of the challenge process only if it has engaged in this meet and confer process first or  
9 establishes that the Designating Party is unwilling to participate in the meet and confer process in  
10 a timely manner.

11         6.3     Judicial Intervention. If the Parties cannot resolve a challenge without court  
12 intervention, the Challenging Party may file and serve a motion to challenge confidentiality (in  
13 compliance with Civil Local Rule 141, if applicable). Each such motion must be accompanied by  
14 a competent declaration affirming that the movant has complied with the meet and confer  
15 requirements imposed in the preceding paragraph.

16         The burden of persuasion in any such challenge proceeding shall be on the Designating  
17 Party. Frivolous challenges and those made for an improper purpose (e.g., to harass or impose  
18 unnecessary expenses and burdens on other parties) may expose the Challenging Party to  
19 sanctions. All parties shall continue to afford the material in question the level of protection to  
20 which it is entitled under the Producing Party's designation until the court rules on the challenge.

21         7.         ACCESS TO AND USE OF PROTECTED MATERIAL

22         7.1     Basic Principles. A Receiving Party may use Protected Material that is disclosed or  
23 produced by another Party or by a Non-Party in connection with this case only for prosecuting,  
24 defending, or attempting to settle this litigation. Such Protected Material may be disclosed only to  
25 the categories of persons and under the conditions described in this Order. When the litigation has  
26 been terminated, a Receiving Party must comply with the provisions of section 15 below (FINAL  
27 DISPOSITION).

28         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.



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7.2 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 litigation;

(b) the officers, directors, and employees (including House Counsel) of the Receiving Party to whom disclosure is reasonably necessary for this litigation; except that defendants’ officers, directors, and employees (including House Counsel) shall not have access to co-defendants’ CONFIDENTIAL information or items;

(c) Experts (as defined in this Order) of the Receiving Party (1) to whom disclosure is reasonably necessary for this litigation, (2) who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A), and (3) as to whom the procedures set forth in paragraph 7.4(a), below, have been followed;

(d) the court and its personnel;

(e) court reporters and their staff, professional jury or trial consultants, mock jurors, and Professional Vendors to whom disclosure is reasonably necessary for this litigation and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A);

(f) the author or recipient of a document containing the information or a custodian or other person who otherwise possessed or knew the information. Without in any way limiting the generality of the foregoing:

(i). A present director, officer, and/or employee of a Designating Party may be examined and may testify concerning all Protected Material which has been produced by that party and/or which the witness has personal knowledge;

(ii). A former director, officer, agent and/or employee of a Designating Party may be interviewed, examined and may testify concerning all Protected Material of which he or she has personal knowledge, including any Protected Material that refers to matters of which the

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2 witness has personal knowledge, which has been produced by that party and which pertains to the  
3 period or periods of his or her employment; and

4 (iii). Non-parties may be examined or testify concerning any document containing  
5 Protected Material of a Designating Party which appears on its face or from other documents or  
6 testimony to have been received from or communicated to the Non-party as a result of any  
7 contact or relationship with the Designating Party or a representative of the Designating Party.

8 (g) employees of any Non-Party indemnifying a Party with respect to any claim or  
9 defense in this litigation: (1) to whom disclosure is reasonably necessary for this litigation, and  
10 (2) who has signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A).

11 7.3 Disclosure of “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”  
12 Information or Items. Unless otherwise ordered by the court or permitted in writing by the  
13 Designating Party, a Receiving Party may disclose any information or item designated “HIGHLY  
14 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” only to:

15 (a) the Receiving Party’s Outside Counsel of Record in this action, as well as employees  
16 of said Outside Counsel of Record to whom it is reasonably necessary to disclose the information  
17 for this litigation;

18 (b) House Counsel of the Receiving Party to whom disclosure is reasonably necessary for  
19 this litigation; except that defendants’ House Counsel shall not have access to co-defendants’  
20 HIGHLY CONFIDENTIAL information or items;

21 (c) Experts of the Receiving Party (1) to whom disclosure is reasonably necessary for this  
22 litigation, (2) who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A),  
23 and (3) as to whom the procedures set forth in paragraph 7.4(a), below, have been followed;

24 (d) the court and its personnel;

25 (e) court reporters and their staff, professional jury or trial consultants, mock jurors, and  
26 Professional Vendors to whom disclosure is reasonably necessary for this litigation and who have  
27 signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A);  
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2 (f) the author or recipient of a document containing the information or a custodian or  
3 other person who otherwise possessed or knew the information. Without in any way limiting the  
4 generality of the foregoing:

5 (i). A present director, officer, and/or employee of a Designating Party may be  
6 examined and may testify concerning all Protected Material which has been produced by that  
7 party and/or which the witness has personal knowledge;

8 (ii). A former director, officer, agent and/or employee of a Designating Party may  
9 be interviewed, examined and may testify concerning all Protected Material of which he or she  
10 has personal knowledge, including any Protected Material that refers to matters of which the  
11 witness has personal knowledge, which has been produced by that party and which pertains to the  
12 period or periods of his or her employment; and

13 (iii). Non-parties may be examined or testify concerning any document containing  
14 Protected Material of a Designating Party which appears on its face or from other documents or  
15 testimony to have been received from or communicated to the Non-party as a result of any  
16 contact or relationship with the Designating Party or a representative of the Designating Party.

17 (g) One designated employee of any Non-Party indemnifying a Party with respect to any  
18 claim or defense in this litigation: (1) to whom disclosure is reasonably necessary for this  
19 litigation, and (2) who has signed the “Acknowledgment and Agreement to Be Bound” (Exhibit  
20 A).

21 7.4 Procedures for Approving or Objecting to Disclosure of ‘CONFIDENTIAL’ or  
22 ‘HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY’ Information or Items to Experts.

23 (a) Unless otherwise ordered by the court or agreed to in writing by the Designating  
24 Party, a Party that seeks to disclose to an Expert (as defined in this Order) any information or item  
25 that has been designated “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’  
26 EYES ONLY” pursuant to paragraph 7.2(c) or 7.3(c) must first make a written request to the  
27 Designating Party that (1) sets forth the full name of the Expert and the city and state of his or her  
28 primary residence, (2) attaches a copy of the Expert’s current resume, (3) identifies the Expert’s  
current employer(s), (4) identifies each person or entity to whom the expert has provided

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2 professional services, including in connection with a litigation, at any time during the preceding  
3 five years, and (5) identifies (by name and number of the case, filing date, and location of court)  
4 any litigation in connection with which the Expert has offered expert testimony, including  
5 through a declaration, report, or testimony at a deposition or trial, during the preceding five years.

6 (b) A Party that makes a request and provides the information specified in the preceding  
7 respective paragraphs may disclose Protected Material to the identified Designated House  
8 Counsel or Expert unless, within 14 days of delivering the request, the Party receives a written  
9 objection from the Designating Party. Any such objection must set forth in detail the grounds on  
10 which it is based.

11 (c) A Party that receives a timely written objection must meet and confer with the  
12 Designating Party (through direct voice to voice dialogue) to try to resolve the matter by  
13 agreement within seven days of the written objection. If no agreement is reached, the Party  
14 seeking to make the disclosure to the Expert may file a motion (in compliance with Civil Local  
15 Rule 141, if applicable) seeking permission from the court to do so. Any such motion must be  
16 accompanied by a competent declaration describing the parties' efforts to resolve the matter by  
17 agreement (i.e., the extent and the content of the meet and confer discussions) and setting forth  
18 the reasons advanced by the Designating Party for its refusal to approve the disclosure.

19 In any such proceeding, the Party opposing disclosure to the Expert shall bear the burden  
20 of proving that the risk of harm that the disclosure would entail outweighs the Receiving Party's  
21 need to disclose the Protected Material to its Expert.

22 8. PROSECUTION BAR

23 Absent written consent from the Producing Party, any individual who receives access to  
24 "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" information (excepting  
25 documents and information related only to damages or reasonable royalty rates) shall not be  
26 involved in the prosecution of patents or patent applications relating to pools, including without  
27 limitation the patents asserted in this action and any patent or application claiming priority to or  
28 otherwise related to the patents asserted in this action, before any foreign or domestic agency,  
including the United States Patent and Trademark Office ("the Patent Office"). For purposes of

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2 this paragraph, “prosecution” includes directly or indirectly drafting, amending, advising, or  
3 otherwise affecting the scope or maintenance of patent claims. To avoid any doubt,  
4 “prosecution” as used in this paragraph does not include representing a party challenging a patent  
5 before a domestic or foreign agency (including, but not limited to, a reissue protest, ex parte  
6 reexamination or inter partes reexamination). This Prosecution Bar shall begin when access to  
7 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” information is first received by  
8 the affected individual and shall end two (2) years after final termination of this action. Nothing  
9 in this paragraph shall prevent: (1) a Party, House Counsel, or Outside Counsel from erecting an  
10 Ethical Wall to permit an individual employed by that Party, House Counsel, or Outside Counsel  
11 who did not receive access to “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”  
12 information from engaging in prosecution activities; or (2) any attorney from sending Prior Art to  
13 an attorney involved in prosecution for purposes of ensuring that such Prior Art is submitted to  
14 the Patent Office (or any similar agency of a foreign government) to assist a patent applicant in  
15 complying with its duty of candor, provided that such “HIGHLY CONFIDENTIAL –  
16 ATTORNEYS’ EYES ONLY” information is submitted in such a way as to ensure that it will not  
17 be made part of the public record.

18 9. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN  
19 OTHER LITIGATION

20 If a Party is served with a subpoena or a court order issued in other litigation that compels  
21 disclosure of any information or items designated in this action as “CONFIDENTIAL” or  
22 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” that Party must:

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

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

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

4 If the Designating Party timely seeks a protective order, the Party served with the  
5 subpoena or court order shall not produce any information designated in this action as  
6 “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” before  
7 a determination by the court from which the subpoena or order issued, unless the Party has  
8 obtained the Designating Party’s permission. The Designating Party shall bear the burden and  
9 expense of seeking protection in that court of its confidential material – and nothing in these  
10 provisions should be construed as authorizing or encouraging a Receiving Party in this action to  
11 disobey a lawful directive from another court.

12 10. A NON-PARTY’S PROTECTED MATERIAL SOUGHT TO BE PRODUCED  
13 IN THIS LITIGATION

14 (a) The terms of this Order are applicable to information produced by a Non- Party in  
15 this action and designated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL –  
16 ATTORNEYS’ EYES ONLY”. Such information produced by Non-Parties in connection with  
17 this litigation is protected by the remedies and relief provided by this Order. Nothing in these  
18 provisions should be construed as prohibiting a Non-Party from seeking additional protections.

19 (b) In the event that a Party is required, by a valid discovery request, to produce a  
20 Non-Party’s confidential information in its possession, and the Party is subject to an agreement  
21 with the Non-Party not to produce the Non-Party’s confidential information, then the Party shall:

22 1 promptly notify in writing the Requesting Party and the Non-Party  
23 that some or all of the information requested is subject to a confidentiality agreement with a Non-  
24 Party;

25 2. promptly provide the Non-Party with a copy of the Stipulated  
26 Protective Order in this litigation, the relevant discovery request(s), and a reasonably specific  
27 description of the information requested; and

28 3. make the information requested available for inspection by the  
Non-Party.

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(c) If the Non-Party fails to object or seek a protective order from this court within 14 days of receiving the notice and accompanying information, the Receiving Party may produce the Non-Party’s confidential information responsive to the discovery request. If the Non-Party timely seeks a protective order, the Receiving Party shall not produce any information in its possession or control that is subject to the confidentiality agreement with the Non-Party before a determination by the court. Absent a court order to the contrary, the Non-Party shall bear the burden and expense of seeking protection in this court of its Protected Material.

11. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

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

12. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED MATERIAL

Nothing in this Protective Order shall require production of information that a party contends is protected from disclosure by the attorney-client privilege, the work product immunity or other privilege, doctrine, right, or immunity. If information subject to a claim of attorney-client privilege, work product immunity, or other privilege, doctrine, right, or immunity is nevertheless inadvertently or unintentionally produced, such production shall in no way prejudice or otherwise constitute a waiver or estoppel as to any such privilege, doctrine, right or immunity. If material is produced in discovery that is subject to a claim of privilege or of protection, the party making the claim may notify any party that received the material of the claim and the basis for it. After being notified, a party must promptly return or destroy the specified material and any copies it has and may not sequester, use or disclose the material until the claim is resolved. This includes a restriction against presenting the material itself to the court for a determination of the

1  
2 claim. Notwithstanding the foregoing, this paragraph does not restrict a Receiving Party from  
3 challenging the privileged nature (or alleged non-waiver of privilege) of the material by seeking  
4 relief from the Court.

5 13. MISCELLANEOUS

6 13.1 Right to Further Relief. Nothing in this Order abridges the right of any person to  
7 seek its modification by the court in the future.

8 13.2 Right to Assert Other Objections. By stipulating to the entry of this Protective  
9 Order no Party waives any right it otherwise would have to object to disclosing or producing any  
10 information or item on any ground not addressed in this Stipulated Protective Order. Similarly, no  
11 Party waives any right to object on any ground to use in evidence of any of the material covered  
12 by this Protective Order.

13 13.3 Filing Protected Material. Without written permission from the Designating  
14 Party or a court order secured after appropriate notice to all interested persons, a Party may not  
15 file in the public record in this action any Protected Material. A Party that seeks to file under seal  
16 any Protected Material must comply with Civil Local Rule 141. Protected Material may only be  
17 filed under seal pursuant to a court order authorizing the sealing of the specific Protected Material  
18 at issue. Pursuant to Civil Local Rule 141, a sealing order will issue only upon a request  
19 establishing that the Protected Material at issue is privileged, protectable as a trade secret, or  
20 otherwise entitled to protection under the law. If a Receiving Party's request to file Protected  
21 Material under seal pursuant to Civil Local Rule 141 is denied by the court, then the Receiving  
22 Party may file the Protected Material in the public record pursuant to Civil Local Rule 141 unless  
23 otherwise instructed by the court.

24 13.4 Draft Expert Reports. Testifying Experts shall not be subject to discovery on any  
25 draft of their reports in this case and such draft reports, notes, outlines, or any other writings  
26 leading up to an issued report(s) in this litigation are exempt from discovery. In addition, all  
27 communications to and from a testifying Expert in this case, and all materials generated by a  
28 testifying Expert in this case with respect to that person's work, are exempt from discovery unless  
relied upon by the Expert in forming any opinions in this litigation.



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13.5 Post-Lawsuit Privileged Communications. No Party or Non-Party shall be required to identify on their respective privilege log any document or communication dated on or after the filing of the lawsuit, which absent this provision, the party would have been obligated to so identify on said privilege log.

14. FINAL DISPOSITION

Within 60 days after the final disposition of this action, as defined in paragraph 4, each Receiving Party must return all Protected Material to the Producing Party or destroy such material. As used in this subdivision, "all Protected Material" includes all copies, abstracts, compilations, summaries, and any other format reproducing or capturing any of the Protected Material. Whether the Protected Material is returned or destroyed, the Receiving Party must submit a written certification to the Producing Party (and, if not the same person or entity, to the Designating Party) by the 60 day deadline that (1) identifies (by category, where appropriate) all the Protected Material that was returned or destroyed and (2) affirms that the Receiving Party has not retained any copies, abstracts, compilations, summaries or any other format reproducing or capturing any of the Protected Material. Notwithstanding this provision, Counsel is not required to delete information that may reside on its electronic mail or electronic back-up systems that are over-written in the normal course of business. Notwithstanding this provision, Counsel are entitled to retain an archival copy of all pleadings, motion papers, trial, deposition, and hearing transcripts, legal memoranda, correspondence, deposition and trial exhibits, expert reports, attorney work product, and consultant and expert work product, even if such materials contain Protected Material. Any such archival copies that contain or constitute Protected Material remain subject to this Protective Order as set forth in Section 4 (DURATION).

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IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

DATED: July \_\_, 2011

\_\_\_\_\_  
Jack Slobodin  
Attorneys for Plaintiff

DATED: July \_\_, 2011

\_\_\_\_\_  
Paul Gale  
Attorneys for Defendant

PURSUANT TO STIPULATION, IT IS SO ORDERED.

DATED: August 8, 2011.

Counsel submitted a signed .pdf of this order.

  
\_\_\_\_\_  
UNITED STATES MAGISTRATE JUDGE

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**EXHIBIT A**

**ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND**

I, \_\_\_\_\_ [print or type full name], of \_\_\_\_\_ [print or type full address], declare under penalty of perjury that I have read in its entirety and understand the Stipulated Protective Order that was issued by the United States District Court for the Eastern District of California on in the above captioned action. I agree to comply with and to be bound by all the terms of this Stipulated Protective Order and I understand and acknowledge that failure to so comply could expose me to sanctions and punishment in the nature of contempt. I solemnly promise that I will not disclose in any manner any information or item that is subject to this Stipulated Protective Order to any person or entity except in strict compliance with the provisions of this Order.

I further agree to submit to the jurisdiction of the United States District Court for the Eastern 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 where sworn and signed: \_\_\_\_\_

Printed name: \_\_\_\_\_  
[printed name]

Signature: \_\_\_\_\_  
[signature]