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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

SHARIDAN STILES, an individual, STILES
4 U, INC., a California corporation,

Plaintiffs,

v.

WALMART INC., f/k/a WAL-MART
STORES, INC.; AMERICAN
INTERNATIONAL INDUSTRIES,

Defendants.

Case No. 2:14-cv-02234-MCE-CMK

PROTECTIVE ORDER

Judge: The Honorable Morrison C.
England, Jr.

Magistrate Judge: Dennis M. Cota

Pursuant to Rule 26(c) of the Federal Rules of Civil Procedure and Local Rule 141.1, the Court, for good cause shown, hereby enters the following Protective Order in the above-captioned matter, which is applicable to plaintiffs Sharidan Stiles and STILES 4 U, Inc. (collectively, “Plaintiffs”); defendants Walmart Inc.¹ (“Walmart”) and American International Industries (“AI”) (collectively, “Defendants”) (“Plaintiffs” and “Defendants” together, the “Parties”) and to third parties:

1. This action is likely to involve confidential commercial, financial, and proprietary information; private information of third parties; and trade secrets, for which special protection from public disclosure and from use for any purpose other than prosecution of this action is warranted. Such confidential and proprietary materials and information consist of, among other

¹ Effective February 1, 2018, Wal-Mart Stores, Inc. changed its name to “Walmart Inc.”

1 things, business and financial information with respect to the accused products and other
2 products, such as information on cost, pricing, sales, revenue, and profits; information regarding
3 defendants' business practices and commercial operations; other commercial information
4 (including information implicating privacy rights of third parties, *e.g.*, Walmart's customers);
5 information otherwise generally not available to the public, or which may be privileged or
6 otherwise protected from disclosure under state or federal statutes, court rules, case decisions, or
7 common law. Accordingly, to expedite the flow of information, to facilitate the prompt
8 resolution of disputes over confidentiality of discovery materials, to adequately protect
9 information the parties are entitled to keep confidential, to ensure that the parties are permitted
10 reasonable necessary uses of such material in preparation for and in the conduct of trial, to
11 address their handling at the end of the litigation, and serve the ends of justice, a protective order
12 for such information is justified in this matter. Information will not be designated as confidential
13 for tactical reasons and nothing will be designated without a good-faith belief that it has been
14 maintained in a confidential, non-public manner, and there is good cause why it should not be
15 part of the public record of this case.

16 2. A Court order is also necessary, as opposed to a private agreement, because
17 Plaintiffs and Walmart have met and conferred since August, 2018 to negotiate a stipulated
18 protective order. Plaintiffs refused to agree to Walmart's proposed protective order because it
19 contained an optional "attorneys' eyes only" ("AEO") provision. Plaintiffs now dispute the need
20 for a protective order in this case altogether.

21 3. This Protective Order shall govern the disclosure of materials designated as
22 Confidential Material during the course of discovery. Confidential Material, as used in this
23 Order, shall refer to any document or item designated as Confidential, including but not limited
24 to, documents or items produced during discovery, all copies thereof, and the information
25 contained in such material.

26 4. Confidential Material, as used in this Order, consists of the following materials
27 and categories of materials:

28 a. Materials relating to any privileged, confidential, or nonpublic information,

1 including, but not limited to, trade secrets, research, design, development,
2 financial, technical, marketing, planning, personal, or commercial
3 information, as such terms are used in the Federal Rules of Civil Procedure
4 and any applicable case law interpreting Rule 26(c)(1)(G) or the former Rule
5 26(c)(7), contracts; proprietary information; vendor agreements; personnel
6 files; claim/litigation information; or certain policies and procedures. There
7 is a need to protect confidential business or commercial information because
8 it could be abused if not limited to this litigation, including potential use by
9 third party competitors.

10 b. Protected Data shall refer to any information that a party believes in good
11 faith to be subject to federal, state or foreign data protection laws or other
12 privacy obligations. Examples of such data protection laws include but are
13 not limited to The Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 et seq.
14 (financial information); and, The Health Insurance Portability and
15 Accountability Act and the regulations thereunder, 45 CFR Part 160 and
16 Subparts A and E of Part 164 (medical information). Certain Protected Data
17 may compel alternative or additional protections beyond those afforded
18 Confidential Material, in which event the parties shall meet and confer in
19 good faith, and, if unsuccessful, shall move the Court for appropriate relief.

20 5. If any party seeks to designate additional documents or categories of documents as
21 Confidential Material, it will be the burden of the party seeking protected status to move for a
22 Court Order designating the materials as confidential after the parties confer.

23 6. Such Confidential Material as described in paragraph 4 should be given the
24 protection of an order of this Court to prevent injury through disclosure to persons other than
25 those persons involved in the prosecution or defense of this litigation.

26 7. To designate information as confidential, the producing party shall mark
27 Confidential Material with the legend “CONFIDENTIAL- SUBJECT TO PROTECTIVE
28 ORDER” and shall submit confidential discovery, such as answers to interrogatories or answers

1 to requests for admissions, in a separate document stamped with the appropriate legend. The
2 Receiving Party may make copies of Confidential Material and such copies shall become subject
3 to the same protections as the Confidential Material from which those copies were made.

4 a. Information on a disk or other electronic format may be designated
5 confidential by marking the storage medium itself with the legend “CONFIDENTIAL- SUBJECT
6 TO PROTECTIVE ORDER”. The Receiving Party shall mark any hard-copy printouts and the
7 storage medium of any permissible copies of such electronic material with the corresponding
8 legend contained on the original and such copies shall become subject to the same protections, as
9 the Confidential Material from which those copies were made.

10 b. Information disclosed at any deposition of a party taken in this action may
11 be designated by the party as confidential by indicating on the record at the deposition that the
12 information is confidential and subject to the provisions of this Order. Alternatively, the party
13 may designate information disclosed at the deposition as confidential by notifying the court
14 reporter and other parties in writing, within 15 business days of receipt of the transcript, of the
15 specific pages and lines of the transcript which are designated as confidential. The parties may
16 agree to a reasonable extension of the 15 business day period for designation. Designations of
17 transcripts will apply to audio, video, or other recordings of the testimony. During such 15
18 business day period, the entire transcript shall receive confidential treatment. Upon such
19 designation, the court reporter and each party shall affix the “CONFIDENTIAL- SUBJECT TO
20 PROTECTIVE ORDER” legend to the designated pages and segregate them as appropriate.

21 c. Copies of material described in paragraph 4 above, or incorporated into
22 paragraph 4 by Court Order, and which were produced without the designation of
23 “CONFIDENTIAL- SUBJECT TO PROTECTIVE ORDER” may be so designated later if the
24 Producing Party failed to make such designation at the time of production through inadvertence
25 or error. If such information has been disclosed to persons not qualified pursuant to paragraph 9
26 below, the party who disclosed such information shall take reasonable efforts to retrieve
27 previously disclosed Confidential Material and advise such persons that the material is
28 Confidential.

1 8. Pursuant to Federal Rule of Evidence 502(d), disclosure (including production) of
2 information that a party or non-party later claims should not have been disclosed because of a
3 privilege, including, but not limited to, the attorney-client privilege or work product doctrine
4 (“Privileged Information”), shall not constitute a waiver of, or estoppel to, any claim of attorney-
5 client privilege, attorney work product, or other ground for withholding production as to which
6 the Producing Party would be entitled in the Litigation or any other federal or state proceeding.
7 Pursuant to Federal Rule of Civil Procedure 26(b)(5)(B) and Federal Rule of Evidence 502(e), the
8 Receiving Party hereby agrees to return, sequester, or destroy any Privileged Information
9 disclosed or produced by the Producing Party upon request. If the Receiving Party reasonably
10 believes that Privileged Information has been inadvertently disclosed or produced to it, it shall
11 promptly notify the Producing Party and sequester such information until instructions as to
12 disposition are received. The failure of any party to provide notice or instructions under this
13 Paragraph shall not constitute a waiver of, or estoppel to, any claim of attorney-client privilege,
14 attorney work product, or other ground for withholding production as to which the Producing
15 Party would be entitled in the Litigation or any other federal or state proceeding. This provision
16 is designed to foreclose any arguments that by making such production, the production of
17 Confidential Materials subject to a legally recognized claim of privilege, including without
18 limitation the attorney-client privilege, work-product doctrine, or other applicable privilege:

- 19 a. was not inadvertent by the Producing Party;
- 20 b. that the Producing Party did not take reasonable steps to prevent the
21 disclosure of privileged Documents;
- 22 c. that the Producing Party did not take reasonable or timely steps to rectify
23 such Disclosure; and/or
- 24 d. that such Disclosure acts as a waiver of applicable privileges or protections
25 associated with such Documents.

26 9. Any Confidential Material and the information contained therein shall be
27 disclosed only to the Court, its staff, and counsel of record, and also shall be disclosed on a need-
28 to-know basis only to the parties, counsel’s staff personnel, employees of a party to whom

1 disclosure is necessary in connection with the preparation for and trial of this action, and any
2 witnesses in the case (including consulting and testifying experts) as may from time to time
3 reasonably be necessary in prosecution or defense of this action. Confidential Material shall not
4 be disclosed to any outside experts or consultants who are current or former employees or current
5 or former consultants of a direct competitor of any party named in the Litigation. Counsel shall
6 advise all persons to whom Confidential Material is disclosed pursuant to this Order of the
7 existence of this Order, and shall provide all such persons (other than the Court and its staff) with
8 a copy of this Order. Counsel also shall require all persons, except the Court, its staff, the parties,
9 counsel of record and counsel's staff personnel, to execute the Affidavit attached as *Exhibit A*,
10 prior to the disclosure of Confidential Material. It shall be the obligation of counsel, upon
11 learning of any breach or threatened breach of this Protective Order, to promptly notify counsel
12 for the Producing Party of such breach or threatened breach. Counsel shall not otherwise offer or
13 permit disclosure of any Confidential Material, its contents, or any portion or summary thereof.
14 Disputes concerning the confidential nature of such materials shall be resolved by the Court upon
15 motion prior to dissemination of any Confidential Material.

16 10. Persons having knowledge of Confidential Material and information by virtue of
17 their participation in the conduct of this litigation shall use them for that purpose only and only as
18 permitted herein, and shall not disclose such Confidential Material, their contents or any portion
19 or summary thereof to any person(s) not involved in the conduct of this litigation. If any person
20 having access to the Confidential Material herein shall violate this Order, he/she may be subject
21 to sanctions by the Court.

22 11. The provisions of this Protective Order shall not affect, and this Order does not
23 limit, the use or admissibility of Confidential Material (or references to that material) as evidence
24 at trial, or during a hearing or similar proceeding in this action or as part of the record on appeal,
25 provided that either party may seek an appropriate Court Order to protect Confidential Material.

26 12. Nothing in this Protective Order shall be deemed to preclude any party or
27 interested member of the public from seeking and obtaining, on an appropriate showing, a
28 modification of this Order including additional protection with respect to confidentiality of

1 material or the removal of a confidential designation. Should counsel or an interested member of
2 the public disagree with any designation of material as confidential, he or she first shall attempt to
3 resolve such dispute with the parties' counsel and, if unsuccessful, apply to the Court for a
4 determination as to whether the material or information should remain designated as Confidential
5 Material. Pending resolution of any challenges, the material at issue shall continue to be treated
6 as Confidential Material until ordered otherwise by the Court.

7 13. The restrictions set forth in any of the preceding paragraphs shall not apply to
8 information or material that was, is or becomes public knowledge in a manner other than by
9 violation of this Order.

10 14. Confidential Material may be filed with the Court. Should any party have good
11 cause to seal from public view any Confidential Material that is filed with the Court, that party
12 must file a separate and specific request to seal in compliance with Local Rule 141. The request
13 will only be granted for good cause shown and if consistent with federal case law regarding
14 materials under seal. If a party files papers that include Confidential Material of another party,
15 the filing party shall file a request to seal indicating that another party has designated the
16 Confidential Material for protection and shall comply with all provisions of Local Rule 141(b)
17 except the provisions requiring the filing party to set forth "the basis for sealing," "the statutory or
18 other authority for sealing, the requested duration, [and] the identity, by name or category, of
19 persons to be permitted access to the documents." The designating party shall respond to the
20 request to seal within three (3) days, setting forth "the basis for sealing," "the statutory or other
21 authority for sealing, the requested duration, [and] the identity, by name or category, of persons to
22 be permitted access to the documents." Any member of the public may challenge any attempt by
23 any party to the sealing of the documents filed with the Court.

24 15. In the event Confidential Materials or portions of transcripts are sealed as
25 confidential by the Court as described in paragraph 12 above, they shall be filed in an envelope
26 bearing the following designation when deposited:

27 **CONFIDENTIAL**

28 IN ACCORDANCE WITH THE PROTECTIVE ORDER OF THE

1 COURT, THE CONTENTS OF THIS ENVELOPE SHALL BE
2 TREATED AS CONFIDENTIAL AND MUST NOT BE SHOWN
3 TO A PERSON OTHER THAN THE COURT, THE PARTIES,
4 ATTORNEYS IN THIS CASE, OR TO PERSONS ASSISTING
5 THOSE ATTORNEYS.

6 16. This Order shall continue to be binding throughout and after the conclusion of this
7 litigation, including all appeals. Within 30 days of settlement or final adjudication, including but
8 not limited to final adjudication of any appeals or petitions for extraordinary writs, all items
9 designated as “Confidential,” and all copies or summaries thereof shall be returned to the party
10 that produced such materials or shall be destroyed. Whether the Confidential Material is returned
11 or destroyed, the Receiving Party must submit a written certification to the Producing Party by
12 the 30-day deadline that (1) identifies (by category, where appropriate) all the Confidential
13 Material that was returned or destroyed and (2) affirms that the Receiving Party has not retained
14 any copies, abstracts, compilations, summaries or any other format reproducing or capturing any
15 of the Confidential Material. Notwithstanding this provision, counsel is entitled to retain any
16 attorney work product.

17 17. If any person receiving documents covered by this Order is served with a
18 subpoena, order, interrogatory, or document or civil investigative demand (collectively, a
19 “Demand”) issued in any other action, investigation, or proceeding, and such Demand seeks
20 material that was produced or designated as Confidential Material by someone other than the
21 Receiving Party, the Receiving Party shall give prompt written notice by hand or facsimile
22 transmission within five (5) business days of receipt of such Demand to the party or non-party
23 who produced or designated the material as Confidential Material, and shall object to the
24 production of such materials on the grounds of the existence of this Order. The burden of
25 opposing the enforcement of the Demand shall fall upon the party or non-party who produced or
26 designated the material as Confidential Material. Unless the party or non-party who produced or
27 designated the Confidential Material obtains an order directing that the Demand not be complied
28 with, and serves such order upon the Receiving Party prior to production pursuant to the Demand,
the Receiving Party shall be permitted to produce documents responsive to the Demand on the
Demand response date, provided sufficient notice of the Demand is provided. Compliance by the

1 Receiving Party with any order directing production pursuant to the Demand of any Confidential
2 Material shall not constitute a violation of this Order. Nothing in this Order shall be construed as
3 authorizing a party to disobey a lawful subpoena issued in another action.

4 18. In the event additional parties join or intervene in this litigation, the newly joined
5 party(ies) shall not have access to Confidential Material until its/their counsel has executed and,
6 at the request of any party, filed with the Court the agreement of such party(ies) and such counsel
7 to be fully bound by this Order.

8 19. Nothing in this Order shall be deemed to limit the extent to which counsel for the
9 parties may advise or represent their respective clients, conduct discovery, prepare for trial,
10 present proof at trial, including any document herein, or oppose the production or admissibility of
11 any information or documents which have been requested.

12 20. This Order shall remain in full force and effect until such time as it is modified,
13 amended or rescinded by the Court.

14 **ORDER**

15 IT IS SO ORDERED.

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18 Dated: December 3, 2018

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21 DENNIS M. COTA
22 UNITED STATES MAGISTRATE JUDGE
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EXHIBIT A
(Affidavit)

1. My name is _____ . I live
at _____ .

2. I am aware that a Protective Order has been entered in
_____, pending in the _____, and a
copy thereof has been given to me.

3. I acknowledge that documents and information designated as confidential pursuant to
such Protective Order are being disclosed to me only upon the condition that I agree to be subject
to the jurisdiction of this Court and to that Order. I hereby agree to abide by such Order, subject
to all penalties prescribed therein, including contempt of Court, for disobedience of said Order. I
promise that the documents and information given confidential treatment under the Protective
Order entered in this case will be used by me only in connection with assisting counsel for the
parties in preparing for litigation of the above-captioned matters. I understand that any use of
such Confidential Material in any manner contrary to the provisions of the Protective Order will
subject me to the sanctions of this Court for contempt.

4. I promise that I will not disclose or discuss such Confidential Materials or information
any person other than the parties and counsel for the parties or members of their staff.