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DVD COPY CONTROL ASSOCIATION, INC

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA

3 REALNETWORKS, INC., a Washington
4 Corporation; and REALNETWORKS HOME
5 ENTERTAINMENT, INC., a Delaware
6 corporation,

7 Plaintiffs,

8 v.

9 DVD COPY CONTROL ASSOCIATION, INC., a
10 Delaware nonprofit corporation, DISNEY
11 ENTERPRISES, INC., a Delaware corporation;
12 PARAMOUNT PICTURES CORP., a Delaware
13 corporation; SONY PICTURES ENTER., INC., a
14 Delaware corporation; TWENTIETH CENTURY
15 FOX FILM CORP., a Delaware corporation; NBC
16 UNIVERSAL, INC., a Delaware corporation;
17 WARNER BROS. ENTER. INC., a Delaware
18 corporation; and VIACOM, Inc., a Delaware
19 Corporation,

20 Defendants.

21 AND RELATED CASES

Case Nos. C08 04548 MHP; C08 04719 MHP

[PROPOSED] PROTECTIVE ORDER

22 Plaintiffs RealNetworks, Inc., RealNetworks Home Entertainment, Inc. (collectively “Real”);
23 defendants Paramount Pictures Corp; Sony Pictures Entertainment, Inc.; Twentieth Century Fox Film
24 Corp.; Warner Bros. Entertainment Inc.; Disney Enterprises, Inc.; NBC Universal, Inc, and Viacom,
25 Inc (“collectively, the “Studio Defendants”); and defendant DVD Copy Control Association, Inc.
26 (“DVD CCA”) by and through their respective counsel, hereby respectfully request that the Court enter
27 the following Protective Order (“Order”).

28 **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 would be warranted. Accordingly, the parties hereby

1 stipulate to and petition the court to enter the following Stipulated Protective Order. The parties
2 acknowledge that this Order does not confer blanket protections on all disclosures or responses to
3 discovery and that the protection it affords extends only to the limited information or items that are
4 entitled under the applicable legal principles to treatment as confidential. The parties further
5 acknowledge, as set forth in Section 10, below, that this Stipulated Protective Order creates no
6 entitlement to file confidential information under seal; Civil Local Rule 79-5 sets forth the procedures
7 that must be followed and reflects the standards that will be applied when a party seeks permission
8 from the court to file material under seal.

9 **2. DEFINITIONS**

10 2.1 Party: any party to this action, including all of its officers, directors, employees,
11 consultants, retained experts, and outside counsel (and their support staff).

12 2.2 Disclosure or Discovery Material: all items or information, regardless of the medium or
13 manner generated, stored, or maintained (including, among other things, testimony, transcripts, or
14 tangible things) that are produced or generated in disclosures or responses to discovery in this matter.

15 2.3 “Confidential” Information or Items: information (regardless of how generated, stored
16 or maintained) or tangible things that qualify for protection under standards developed under F.R.Civ.P.
17 26(c).

18 2.4 “Highly Confidential – Attorneys’ Eyes Only” Information or Items: highly sensitive
19 “Confidential Information or Items” whose disclosure to another Party or nonparty would create a
20 substantial detriment to the disclosing Party that could not be avoided by less restrictive means.

21 2.5 Receiving Party: a Party that receives Disclosure or Discovery Material from a
22 Producing Party.

23 2.6 Producing Party: a Party or non-party that produces Disclosure or Discovery Material in
24 this action.

25 2.7 Designating Party: a Party or non-party that designates information or items that it
26 produces in disclosures or in responses to discovery as “Confidential” or “Highly Confidential —
27 Attorneys’ Eyes Only.”

1 If it comes to a Party's or a non-party's attention that information or items that it designated for
2 protection do not qualify for protection at all, or do not qualify for the level of protection initially
3 asserted, that Party or non-party must promptly notify all other parties that it is withdrawing the
4 mistaken designation.

5 5.2 Manner and Timing of Designations. Except as otherwise provided in this Order (see,
6 e.g., second paragraph of section 5.2(a), below), or as otherwise stipulated or ordered, material that
7 qualifies for protection under this Order must be clearly so designated before the material is disclosed
8 or produced.

9 Designation in conformity with this Order requires:

10 (a) for information in documentary form (apart from transcripts of depositions or
11 other pretrial or trial proceedings): The Producing Party must affix the legend "Confidential" or
12 "Highly Confidential – Attorneys' Eyes Only" at the top or bottom of each page that contains Protected
13 Material.

14 A Party or non-party that makes original documents or materials available for inspection need
15 not designate them for protection until after the inspecting Party has indicated which material it would
16 like copied and produced. During the inspection and before the designation, all of the material made
17 available for inspection shall be deemed "Highly Confidential – Attorneys' Eyes Only." After the
18 inspecting Party has identified the documents it wants copied and produced, the Producing Party must
19 determine which documents, or portions thereof, qualify for protection under this Order, then, before
20 producing the specified documents, the Producing Party must affix the appropriate legend
21 ("Confidential" or "Highly Confidential – Attorneys' Eyes Only") at the top of each page that contains
22 Protected Material.

23 (b) for testimony given in deposition or in other pretrial or trial proceedings, that the
24 Party or A Party or non-Party must either (1) state on the record, before the close of the deposition,
25 hearing, or other proceeding, that the testimony or portions of the testimony shall be designated
26 "Confidential" or "Highly Confidential – Attorneys' Eyes Only," or (2) provide written notice to all
27 Parties, within 10 days after receipt of the official transcript, that the testimony shall be designated
28

1 “Confidential” or “Highly Confidential – Attorneys’ Eyes Only.” The Parties shall treat the testimony
2 as “Highly Confidential – Attorneys’ Eyes Only” until the expiration of the 10 day period.

3 Transcript pages containing Protected Material must be marked with the legend “Confidential”
4 or “Highly Confidential – Attorneys’ Eyes Only” as instructed by the Party or non-Party.

5 (c) for information produced in some form other than documentary, and for any
6 other tangible item, that the Producing Party affix in a prominent place on the exterior of the container
7 or containers in which the information or items is stored the legend “Confidential” or “Highly
8 Confidential – Attorneys’ Eyes Only.”

9 (d) for information produced in electronic form on a computer readable medium
10 (e.g., CD-ROM), that the Producing Party affix in a prominent place on the storage medium on which
11 the information is stored, and on any container(s) for such medium, the legend “Confidential” or
12 “Highly Confidential – Attorneys’ Eyes Only.”

13 5.3 Inadvertent Failure to Designate. If timely corrected, an inadvertent failure to designate
14 qualified information or items as “Confidential” or “Highly Confidential – Attorneys’ Eyes Only” does
15 not, standing alone, waive the Designating Party’s right to secure protection under this Order for such
16 material. If material is appropriately designated as “Confidential” or “Highly Confidential –
17 Attorneys’ Eyes Only” after the material was initially produced, the Receiving Party, on timely
18 notification of the designation, must make reasonable efforts to assure that the material is treated in
19 accordance with the provisions of this Order.

20 **6. CHALLENGING CONFIDENTIALITY DESIGNATIONS**

21 6.1 Timing of Challenges. Unless a prompt challenge to a Designating Party’s
22 confidentiality designation is necessary to avoid foreseeable substantial unfairness, unnecessary
23 economic burdens, or a later significant disruption or delay of the litigation, a Party does not waive its
24 right to challenge a confidentiality designation by electing not to mount a challenge promptly after the
25 original designation is disclosed.

26 6.2 Meet and Confer. A Party that elects to initiate a challenge to a Designating Party’s
27 confidentiality designation must do so in good faith and must begin the process by conferring directly
28

1 Such Protected Material may be disclosed only to the categories of persons and under the conditions
2 described in this Order. When the litigation has been terminated, a Receiving Party must comply with
3 the provisions of section 12, below (FINAL DISPOSITION).

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

6 7.2 Disclosure of “Confidential” Information. Unless otherwise ordered by the Court or
7 permitted in writing by the Designating Party, a Receiving Party may disclose any information or item
8 designated “Confidential” only to:

9 (a) the Receiving Party’s Outside Counsel of record in this action, as well as
10 employees of said Counsel to whom it is reasonably necessary to disclose the information for this
11 litigation;

12 (b) the officers, directors, and employees (including House Counsel) of the
13 Receiving Party to whom disclosure is reasonably necessary for this litigation and who have signed the
14 “Agreement to Be Bound by Protective Order” (Exhibit A);

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

18 (d) the Court and its personnel;

19 (e) court reporters and their staffs, to whom disclosure is reasonably necessary for
20 this litigation;

21 (f) Professional Vendors to whom disclosure is reasonably necessary for this
22 litigation, and who have signed the “Agreement to Be Bound by Protective Order” (Exhibit A),
23 provided that all Protected Material is retrieved by the party furnishing it upon completion of the
24 services;

25 (g) during or in preparation for their depositions, witnesses in the action to whom
26 disclosure is reasonably necessary and who have signed the “Agreement to Be Bound by Protective
27 Order” (Exhibit A). Pages of transcribed deposition testimony or exhibits to depositions that reveal
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1 Protected Material must be separately bound by the court reporter and may not be disclosed to anyone
2 except as permitted under this Stipulated Protective Order.; and

3 (h) an author, signatory, or prior recipient of the document or the original source of
4 the information.

5 7.3 Disclosure of “Highly Confidential – Attorneys’ Eyes Only” Information. Unless
6 otherwise ordered by the Court or permitted in writing by the Designating Party, a Receiving Party
7 may disclose any information or item designated “Highly Confidential – Attorneys’ Eyes Only” only
8 to:

9 (a) the Receiving Party’s Outside Counsel of record in this action, as well as
10 employees of said Counsel to whom it is reasonably necessary to disclose the information for this
11 litigation, and three (3) House Counsel per Party who have signed the “Agreement to Be Bound By
12 Protective Order” (Exhibit A);

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

16 (c) the Court and its personnel;

17 (d) court reporters, their staffs, and Professional Vendors to whom disclosure is
18 reasonably necessary for this litigation; and

19 (e) an author, signatory, or prior recipient of the document or the original source of
20 the information.

21 Where the Protected Material is Source Code, and notwithstanding any provision of this section
22 to 7.3 that is to the contrary, disclosure shall be limited as set forth in section 14.

23 **8. IDENTIFICATION OF EXPERTS AND CONSULTANTS AND DESIGNATED HOUSE**
24 **COUNSEL**

25 A Party desiring to disclose any information or item designated “Confidential” or “Highly
26 Confidential – Attorneys’ Eyes Only” to an Expert or House Counsel under Section 2.10(b) or (c) shall
27 first obtain from the Expert or House Counsel under Section 2.10(b) or (c) a signed undertaking in the
28 form of Exhibit A hereto and a current resume (curriculum vitae). For experts, but not for House

1 Counsel under Section 2.10(b) or (c), a copy of said undertaking and resume shall be served upon
2 counsel for the Designating Party with a cover letter identifying each company for which the expert
3 has done work in the past five years or with which the expert has an agreement to do work in the
4 future. For House counsel, a cover letter listing the names and entities by whom they are employed
5 shall be served upon counsel for the Designating Party. The Designating Party shall then have three
6 business days to serve a written objection to disclosure. Any written objection shall state with
7 specificity the reason(s) for such objection. If counsel for Designating Party objects within three
8 business days, there shall be no disclosure to such Expert or House Counsel under Section 2.10(b) or
9 (c), except by agreement of the Parties or by order of the Court. If an objection to disclosure is made
10 within the three-day period, counsel for the Parties shall meet and confer to reach an agreement.
11 Failing that and for good cause shown, the Party proposing the Expert or House Counsel under Section
12 2.10(b) or (c) may file a motion seeking permission to make the disclosure. On any such motion, the
13 Designating Party shall bear the burden of showing why disclosure to the Expert or House Counsel
14 under Section 2.10(b) or (c) should be precluded.

15 Once the Parties have completed the Preliminary Injunction proceedings anticipated at the time
16 of the entry of this Order, all actions under this Section 8 that are required to be undertaken within
17 three business days may thereafter be undertaken with five business days.

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

20 If a Receiving Party is served with a subpoena or an order issued in other litigation that would
21 compel disclosure of any Protected Material designated in this action as “Confidential” or “Highly
22 Confidential – Attorneys’ Eyes Only,” the Receiving Party must so notify the Designating Party
23 immediately in writing and in no event more than three business days after receiving the subpoena or
24 order. Such notification must include a copy of the subpoena or court order.

25 The Receiving Party also must immediately in writing inform the party who caused the
26 subpoena or order to issue in the other litigation that some or all of the material covered by the
27 subpoena or order is the subject of this Order. In addition, the Receiving Party must deliver a copy of
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1 this Order promptly to the Party in the other litigation that caused the subpoena or order to issue.

2 The purpose of imposing these duties is to alert the interested parties to the existence of this
3 Protective Order and to afford the Designating Party in this case an opportunity to try to protect its
4 confidentiality interests in the court from which the subpoena or order issued. The Designating Party
5 shall bear the burdens and the expenses of seeking protection in that court of its confidential material –
6 and nothing in these provisions should be construed as authorizing or encouraging a Receiving Party in
7 this action to disobey a lawful directive from another court.

8 **10. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL**

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

16 **11. FILING PROTECTED MATERIAL**

17 Without written permission from the Designating Party or a court order secured after
18 appropriate notice to all interested persons, a Party may not file in the public record in this action any
19 Protected Material. A Party that seeks to file under seal any Protected Material must comply with Civil
20 Local Rule 79-5.

21 **12. FINAL DISPOSITION**

22 Even after Final Disposition of this action (as defined above), the confidentiality obligations
23 imposed by this Order shall remain in effect until a Designating Party agrees otherwise in writing or a
24 court order otherwise directs.

25 Unless otherwise ordered or agreed in writing by the Producing Party, within 90 days after a
26 Final Disposition of this action, each Receiving Party must return to the Producing Party or destroy all
27 Protected Material. As used in this subdivision, “all Protected Material” includes all copies, abstracts,
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1 compilations, summaries, or any other form of reproducing or capturing any of the Protected Material.
2 Whether the Protected Material is returned or destroyed, the Receiving Party must submit a written
3 certification to the Producing Party by the 90-day deadline affirming that all Protected Material it
4 received has been returned or destroyed and that the Receiving Party, in addition to any individual to
5 which the Receiving Party was entitled under this order to disclose Protected Material, has not retained
6 any copies, abstracts, compilations, summaries or other forms of reproducing or capturing any of the
7 Protected Material. Notwithstanding this provision Counsel are entitled to retain an archival copy of
8 all pleadings, motion papers, transcripts, legal memoranda, correspondence or attorney work product
9 (including exhibits, deposition exhibits, and trial exhibits), even if such materials contain Protected
10 Material. Any such archival copies that contain or constitute Protected Material remain subject to the
11 confidentiality obligations of this Order.

12 **13. INADVERTENT PRODUCTION OF PRIVILEGED MATERIAL**

13 Inadvertent production of any document that a party later claims should not have been
14 produced because of a privilege, including but not limited to the attorney-client privilege or work
15 product doctrine (Inadvertently Produced Privileged Document”), will not be deemed to waive any
16 privilege. The designating party may request the return of any Inadvertently Produced Privileged
17 Document. A request for the return of an Inadvertently Produced Privileged Document shall identify
18 the document inadvertently produced and the basis for withholding such document from production. If
19 a party or nonparty requests the return, pursuant to this paragraph, of any Inadvertently Produced
20 Privileged Document then in the custody of another party or nonparty, such other party shall within ten
21 (10) business days return to the requesting party or nonparty the Inadvertently Produced Privileged
22 Document and all copies thereof and shall destroy any documents summarizing or referring to such
23 Inadvertently Produced Privileged Document. The party returning such material may then move the
24 Court for an order compelling production of the material, but that party shall not assert as a ground for
25 entering such an order the fact or circumstances of the inadvertent production. Without limiting this
26 Paragraph, Federal Rule of Evidence 502, as adopted in S.2450 (111th Congress, 2d Session) on
27 September 19, 2008 shall be deemed to apply in this litigation.

1
2 **14. DISPUTED SECTION:**

3 **A. REAL'S PROPOSED LANGUAGE:**

4 **14. SOURCE CODE MATERIALS**

5 Human-readable source code designated by a Producing Party as “Highly Confidential –
6 Attorneys’ Eyes Only -- Source Code” shall be produced to the Receiving Party’s Outside Counsel and
7 approved Experts in computer searchable format sufficient to allow a user to search and view the
8 Source Code.

9 Production of Real’s Source Code to Receiving Parties shall be subject to the following
10 conditions:

11 (a) All electronic copies of Source Code (including any summary or derivative works that
12 replicate or summarize, in whole in part, such materials) must, except when in use, be password-
13 protected and encrypted by using symmetric key encryption with a key length of at least 128-bits.
14 Such encryption may be accomplished by using PGP, TrueCrypt or other encryption software that
15 permits symmetric key encryption with a key length of at least 128-bits.

16 (b) All electronic copies of Source Code to be made available to Receiving Parties shall be
17 loaded and maintained on only one computer at the offices of Munger Tolles & Olson LLP and only
18 one computer at the offices of White & Case LLP (i) in a secure location, under lock and key, in such a
19 manner as to prevent misappropriation of the Source Code; and, (ii) on a stand-alone computer that is
20 not connected to any computer network. No person from or on behalf of the Receiving Parties is
21 permitted to print or make any copies of any portion of this Source Code.

22 (c) Printed copies of selected portions of the source code may be made by counsel for Real
23 for review by Outside Counsel and approved Experts for Receiving Party. Copies of selected portions
24 of the source code may only include such portions of the source code that require explanation and
25 analysis in deposition, as part of any hearing in this matter or are otherwise reasonably necessary for
26 analysis. In no instance shall any portion of Real’s Digital Rights Management (Real’s proprietary
27 copy management system and license key management system) source code be printed or copied. For

1 those select portions of source code that outside counsel and/or approved experts desire to be printed,
2 they shall assert their good faith belief that such portion of the source code will be necessary for
3 examination in deposition, for use in any hearing in this matter or otherwise reasonably necessary for
4 analysis in writing to counsel for Real. Upon receipt of such request, counsel for Real shall cause to be
5 printed, on copy-protected paper, one copy for use by outside counsel to the DVD CCA, one copy for
6 use by outside counsel for the Studio Defendants, and two copies to be used by approved experts (for a
7 maximum of four total copies). Each page of any printed copy shall be marked “Confidential –
8 SOURCE CODE - Attorneys’ Eyes Only.” Printed copies of portions of the Source Code that are
9 removed from Real or Real’s Outside Counsel’s office shall be kept in a locked container in a locked
10 room at the offices of either the Receiving Party’s Outside Counsel or Receiving Party’s approved
11 expert. Any printed copies shall be destroyed as soon as they are no longer needed and Real’s counsel
12 shall be so notified of said destruction.

13 (d) Only approved Experts and Outside Counsel may have access to Source Code on behalf
14 of Receiving Party. Employees of the Receiving Party, including House Counsel, shall not be allowed
15 access to Source Code, whether in electronic or printed form, under any circumstances.

16 (e) The Receiving Party agrees to be strictly liable for any damages, including
17 consequential damages, caused by the failure of the Receiving Party, its Outside Counsel or its Experts
18 to protect the confidentiality of the Source Code.

19 **B. DEFENDANTS’ PROPOSED LANGUAGE:**

20 **14. SOURCE CODE MATERIALS**

21 a) Production of Source Code. RealNetworks shall produce Human-readable source code
22 designated as “Highly Confidential – Attorneys’ Eyes Only” (“Source Code”) in native electronic
23 format to the defendants. Three copies of the Source Code shall be provided to the Studio Defendants
24 collectively, and three copies to the DVDCCA.

25 b) Access to Source Code.

26 i) The Source Code shall be treated as “Highly Confidential — Attorney’s Eyes
27 Only,” in all respects except as specified in this section.

1 iv) All printouts by a defendant's experts or consultants shall be logged with the
2 date, time, individual, and files printed. RealNetworks may seek to review the logs only if it can
3 establish probable cause to suspect the expert or consultant violated the terms of this Order with
4 respect to the Source Code.

5 e) Termination of Litigation

6 i) At the conclusion of all proceedings in this Court, all copies of the
7 Source Code, including printouts, in the possession of defendants, their counsel, experts, or
8 consultants, shall be promptly destroyed. Defendants' outside counsel, however, may maintain a copy
9 and necessary printouts of the Source Code, during any appeals in this litigation.

10
11 (f) Employees of the Receiving Party, including House Counsel, shall not be allowed
12 access to Source Code, whether in electronic or printed form, under any circumstances.

13 **END OF DISPUTED SECTION 14**

14
15 **15. MISCELLANEOUS**

16 15.1 Right to Further Relief. Nothing in this Order abridges the right of any person to seek
17 its modification by the Court in the future.

18 15.2 Use of Party's Own Materials. Nothing in this Order shall restrict a Party's ability to
19 use and disclose its own designated materials as it chooses. Such disclosure shall not waive the
20 protections of this Order and shall not entitle other Parties or non-Parties to disclose such materials
21 in violation of this Order.

22 15.3 Right to Assert Other Objections. By stipulating to the entry of this Order, no Party
23 waives any right it otherwise would have to object to disclosing or producing any information or
24 item on any ground not addressed in this Order. Similarly, no Party waives any right to object on
25 any ground to use in evidence of any of the material covered by this Order.

26 15.4 Effective Pending Approval. The parties agree that, pending approval by the Court, this
27 Stipulated Supplemental Protective Order shall be effective as if approved and, specifically, that any
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1 violation of its terms shall be subject to the same sanctions and penalties as if this Stipulated
2 Supplemental Protective Order had been entered by the Court.

3 15.5 Retained Jurisdiction. The Court shall retain jurisdiction to enforce this Stipulated
4 Supplemental Protective Order after Final Disposition, unless the Order is vacated.

5 15.6 Modification. In the event any party seeks to amend or vary the terms of this Protective
6 Order, said party shall make such request in the form of a written stipulation or noticed motion.

7
8
9 **IT IS SO ORDERED.**

10
11 Dated: _____,

Marilyn Hall Patel
United States District Judge

1 EXHIBIT A

2 AGREEMENT TO BE BOUND BY PROTECTIVE ORDER

3 I, _____, declare under penalty of perjury that I have read in its entirety
4 and understand the Stipulated Protective Order that was issued by the United States District Court for
5 the Northern District of California in the case of *RealNetworks, Inc., et al. v. DVD Copy Control*
6 *Association, et al.*, Case No. 08-CV-04548 MHP. I agree to comply with and to be bound by all the
7 terms of this Stipulated Protective Order, and I understand and acknowledge that failure to so comply
8 could expose me to sanctions and punishment in the nature of contempt. I solemnly promise that I will
9 not disclose in any manner, nor take any actions that would lead to the disclosure of, any information
10 or item that is subject to this Stipulated Protective Order to any person or entity except in strict
11 compliance with the provisions of this Order.

12 Printed Name: _____

13 Address: _____

14 Present Employer: _____

15 Designated as Expert for (if applicable): _____

16 Date: _____

17 City and State where sworn and signed: _____

18
19 Signature: _____