

Gordon & Rees LLP  
275 Battery Street, Suite 2000  
San Francisco, CA 94111

1 TAD A. DEVLIN (SBN: 190355)  
SHANNON L. ROSS (SBN: 205714)  
2 GORDON & REES LLP  
275 Battery Street, Suite 2000  
3 San Francisco, CA 94111  
Telephone: (415) 986-5900  
4 Facsimile: (415) 986-8054  
Email: tdevlin@gordonrees.com  
5 Email: sross@gordonrees.com  
6 Attorneys for Defendant  
MORRISON & FOERSTER LLP LONG TERM DISABILITY PLAN  
7

8 Daniel Feinberg (SBN 135983)  
Nina Wasow (SBN 242047)  
9 LEWIS, FEINBERG, LEE, RENAKER & JACKSON, P.C.  
476 9<sup>th</sup> Street  
10 Oakland, CA 94607  
Telephone: (510) 839-6824  
11 Facsimile: (510) 839-7839  
Email: dfeinberg@lewisfeinberg.com  
12 Email: nwasow@lewisfeinberg.com

13 ATTORNEYS FOR PLAINTIFF

14  
15 IN THE UNITED STATES DISTRICT COURT  
16 FOR THE NORTHERN DISTRICT OF CALIFORNIA

17  
18 GORDON ERSPAMER ) CASE NO. C08-04692 MMC (JL)  
19 Plaintiff, ) **STIPULATED PROTECTIVE**  
20 v. ) **ORDER**  
21 MORRISON & FOERSTER LLP LONG TERM )  
DISABILITY PLAN, )  
22 Defendant. )  
23

24  
25 1. PURPOSES AND LIMITATIONS

26 Disclosure and discovery activity in this action are likely to involve production of  
27 confidential, proprietary, or private information for which special protection from public  
28 disclosure and from use for any purpose other than prosecuting this litigation may be warranted.

1 Accordingly, the parties hereby stipulate to and petition the court to enter the following  
2 Stipulated Protective Order. The parties acknowledge that this Order does not confer blanket  
3 protections on all disclosures or responses to discovery and that the protection it affords from  
4 public disclosure and use extends only to the limited information or items that are entitled to  
5 confidential treatment under the applicable legal principles. The parties further acknowledge, as  
6 set forth in Section 12.3, below, that this Stipulated Protective Order does not entitle them to file  
7 confidential information under seal; Civil Local Rule 79-5 sets forth the procedures that must be  
8 followed and the standards that will be applied when a party seeks permission from the court to  
9 file material under seal.

10 2. DEFINITIONS

11 2.1 Challenging Party: a Party or Non-Party that challenges the designation of  
12 information or items under this Order.

13 2.2 “CONFIDENTIAL” Information or Items: information (regardless of how  
14 it is generated, stored or maintained) or tangible things that qualify for protection under Federal  
15 Rule of Civil Procedure 26(c).

16 2.3 Counsel (without qualifier): Outside Counsel of Record and House  
17 Counsel (as well as their support staff).

18 2.4 Designating Party: a Party or Non-Party that designates information or  
19 items that it produces in disclosures or in responses to discovery as “CONFIDENTIAL.”

20 2.5 Disclosure or Discovery Material: all items or information, regardless of  
21 the medium or manner in which it is generated, stored, or maintained (including, among other  
22 things, testimony, transcripts, and tangible things), that are produced or generated in disclosures  
23 or responses to discovery in this matter.

24 2.6 Expert: a person with specialized knowledge or experience in a matter  
25 pertinent to the litigation who has been retained by a Party or its counsel to serve as an expert  
26 witness or as a consultant in this action.

27 2.7 House Counsel: attorneys who are employees of a party to this action.  
28 House Counsel does not include Outside Counsel of Record or any other outside counsel.

1                   2.8     Non-Party: any natural person, partnership, corporation, association, or  
2 other legal entity not named as a Party to this action.

3                   2.9     Outside Counsel of Record: attorneys who are not employees of a party to  
4 this action but are retained to represent or advise a party to this action and have appeared in this  
5 action on behalf of that party or are affiliated with a law firm which has appeared on behalf of  
6 that party.

7                   2.10    Party: any party to this action, including all of its officers, directors,  
8 employees, consultants, retained experts, and Outside Counsel of Record (and their support  
9 staffs).

10                  2.11    Producing Party: a Party or Non-Party that produces Disclosure or  
11 Discovery Material in this action.

12                  2.12    Professional Vendors: persons or entities that provide litigation support  
13 services (e.g., photocopying, videotaping, translating, preparing exhibits or demonstrations, and  
14 organizing, storing, or retrieving data in any form or medium) and their employees and  
15 subcontractors.

16                  2.13    Protected Material: any Disclosure or Discovery Material that is  
17 designated as "CONFIDENTIAL."

18                  2.14    Receiving Party: a Party that receives Disclosure or Discovery Material  
19 from a Producing Party.

20                  3.     SCOPE

21                  The protections conferred by this Stipulation and Order cover not only Protected Material  
22 (as defined above), but also (1) any information copied or extracted from Protected Material; (2)  
23 all copies, excerpts, summaries, or compilations of Protected Material; and (3) any testimony,  
24 conversations, or presentations by Parties or their Counsel that might reveal Protected Material.  
25 However, the protections conferred by this Stipulation and Order do not cover the following  
26 information: (a) any information that is in the public domain at the time of disclosure to a  
27 Receiving Party or becomes part of the public domain after its disclosure to a Receiving Party as  
28 a result of publication not involving a violation of this Order, including becoming part of the

1 public record through trial or otherwise; and (b) any information known to the Receiving Party  
2 prior to the disclosure or obtained by the Receiving Party after the disclosure from a source who  
3 obtained the information lawfully and under no obligation of confidentiality to the Designating  
4 Party. Any use of Protected Material at trial shall be governed by a separate agreement or order.

5 4. DURATION

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

13 5. DESIGNATING PROTECTED MATERIAL

14 5.1 Exercise of Restraint and Care in Designating Material for Protection.

15 Each Party or Non-Party that designates information or items for protection under this Order  
16 must take care to limit any such designation to specific material that qualifies under the  
17 appropriate standards. The Designating Party must designate for protection only those parts of  
18 material, documents, items, or oral or written communications that qualify – so that other  
19 portions of the material, documents, items, or communications for which protection is not  
20 warranted are not swept unjustifiably within the ambit of this Order.

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

25 If it comes to a Designating Party's attention that information or items that it  
26 designated for protection do not qualify for protection, that Designating Party must promptly  
27 notify all other Parties that it is withdrawing the mistaken designation.

28 5.2 Manner and Timing of Designations. Except as otherwise provided in this

1 Order (see, e.g., second paragraph of section 5.2(a) below), or as otherwise stipulated or ordered,  
2 Disclosure or Discovery Material that qualifies for protection under this Order must be clearly so  
3 designated before the material is disclosed or produced.

4 Designation in conformity with this Order requires:

5 (a) for information in documentary form (e.g., paper or electronic documents,  
6 but excluding transcripts of depositions or other pretrial or trial proceedings), that the Producing  
7 Party affix the legend “CONFIDENTIAL” to each page that contains protected material. If only  
8 a portion or portions of the material on a page qualifies for protection, the Producing Party also  
9 must clearly identify the protected portion(s) (e.g., by making appropriate markings in the  
10 margins).

11 A Party or Non-Party that makes original documents or materials available for  
12 inspection need not designate them for protection until after the inspecting Party has indicated  
13 which material it would like copied and produced. During the inspection and before the  
14 designation, all of the material made available for inspection shall be deemed  
15 “CONFIDENTIAL.” After the inspecting Party has identified the documents it wants copied and  
16 produced, the Producing Party must determine which documents, or portions thereof, qualify for  
17 protection under this Order. Then, before producing the specified documents, the Producing  
18 Party must affix the “CONFIDENTIAL” legend to each page that contains Protected Material. If  
19 only a portion or portions of the material on a page qualifies for protection, the Producing Party  
20 also must clearly identify the protected portion(s) (e.g., by making appropriate markings in the  
21 margins).

22 (b) for testimony given in deposition or in other pretrial or trial proceedings,  
23 that the Designating Party identify on the record, before the close of the deposition, hearing, or  
24 other proceeding, all protected testimony.

25 (c) for information produced in some form other than documentary and for  
26 any other tangible items, that the Producing Party affix in a prominent place on the exterior of  
27 the container or containers in which the information or item is stored the legend  
28 “CONFIDENTIAL.” If only a portion or portions of the information or item warrant protection,

1 the Producing Party, to the extent practicable, shall identify the protected portion(s).

2           5.3    Inadvertent Failures to Designate.    If timely corrected, an inadvertent  
3 failure to designate qualified information or items does not, standing alone, waive the  
4 Designating Party's right to secure protection under this Order for such material. Upon timely  
5 correction of a designation, the Receiving Party must make reasonable efforts to assure that the  
6 material is treated in accordance with the provisions of this Order.

7           6.       CHALLENGING CONFIDENTIALITY DESIGNATIONS

8           6.1    Timing of Challenges.           Any Party or Non-Party may challenge a  
9 designation of confidentiality at any time. Unless a prompt challenge to a Designating Party's  
10 confidentiality designation is necessary to avoid foreseeable, substantial unfairness, unnecessary  
11 economic burdens, or a significant disruption or delay of the litigation, a Party does not waive its  
12 right to challenge a confidentiality designation by electing not to mount a challenge promptly  
13 after the original designation is disclosed.

14           6.2    Meet and Confer.       The Challenging Party shall initiate the dispute  
15 resolution process by providing written notice of each designation it is challenging and  
16 describing the basis for each challenge. To avoid ambiguity as to whether a challenge has been  
17 made, the written notice must recite that the challenge to confidentiality is being made in  
18 accordance with this specific paragraph of the Protective Order. The parties shall attempt to  
19 resolve each challenge in good faith and must begin the process by conferring directly (in voice  
20 to voice dialogue; other forms of communication are not sufficient) within 14 days of the date of  
21 service of notice. In conferring, the Challenging Party must explain the basis for its belief that  
22 the confidentiality designation was not proper and must give the Designating Party an  
23 opportunity to review the designated material, to reconsider the circumstances, and, if no change  
24 in designation is offered, to explain the basis for the chosen designation. A Challenging Party  
25 may proceed to the next stage of the challenge process only if it has engaged in this meet and  
26 confer process first or establishes that the Designating Party is unwilling to participate in the  
27 meet and confer process in a timely manner.

28           6.3    Judicial Intervention.           If the Parties cannot resolve a challenge

1 without court intervention, the Designating Party shall file and serve a motion to retain  
2 confidentiality under Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5, if  
3 applicable) within 21 days of the initial notice of challenge or within 14 days of the parties  
4 agreeing that the meet and confer process will not resolve their dispute, whichever is earlier.  
5 Each such motion must be accompanied by a competent declaration affirming that the movant  
6 has complied with the meet and confer requirements imposed in the preceding paragraph. Failure  
7 by the Designating Party to make such a motion including the required declaration within 21  
8 days (or 14 days, if applicable) shall automatically waive the confidentiality designation for each  
9 challenged designation. In addition, the Challenging Party may file a motion challenging a  
10 confidentiality designation at any time if there is good cause for doing so, including a challenge  
11 to the designation of a deposition transcript or any portions thereof. Any motion brought  
12 pursuant to this provision must be accompanied by a competent declaration affirming that the  
13 movant has complied with the meet and confer requirements imposed by the preceding  
14 paragraph.

15           The burden of persuasion in any such challenge proceeding shall be on the  
16 Designating Party. Frivolous challenges, and those made for an improper purpose (e.g., to harass  
17 or impose unnecessary expenses and burdens on other parties) may expose the Challenging Party  
18 to sanctions. Unless the Designating Party has waived the confidentiality designation by failing  
19 to file a motion to retain confidentiality as described above, all parties shall continue to afford  
20 the material in question the level of protection to which it is entitled under the Producing Party's  
21 designation until the court rules on the challenge.

22           7.     ACCESS TO AND USE OF PROTECTED MATERIAL

23           7.1    Basic Principles.     A Receiving Party may use Protected Material that  
24 is disclosed or produced by another Party or by a Non-Party in connection with this case only for  
25 prosecuting, defending, or attempting to settle this litigation. Such Protected Material may be  
26 disclosed only to the categories of persons and under the conditions described in this Order.  
27 When the litigation has been terminated, a Receiving Party must comply with the provisions of  
28 section 13 below (FINAL DISPOSITION).

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

4 7.2 Disclosure of "CONFIDENTIAL" Information or Items. Unless otherwise  
5 ordered by the court or permitted in writing by the Designating Party, a Receiving Party may  
6 disclose any information or item designated "CONFIDENTIAL" only to:

7 (a) the Receiving Party's Outside Counsel of Record in this action, as well as  
8 employees of said Outside Counsel of Record to whom it is reasonably necessary to disclose the  
9 information for this litigation and who have signed the "Acknowledgment and Agreement to Be  
10 Bound" that is attached hereto as Exhibit A;

11 (b) the officers, directors, and employees (including House Counsel) of the  
12 Receiving Party to whom disclosure is reasonably necessary for this litigation and who have  
13 signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A);

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

17 (d) the court and its personnel;

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

21 (f) during their depositions, witnesses in the action to whom disclosure is  
22 reasonably necessary and who have signed the "Acknowledgment and Agreement to Be Bound"  
23 (Exhibit A), unless otherwise agreed by the Designating Party or ordered by the court. Pages of  
24 transcribed deposition testimony or exhibits to depositions that reveal Protected Material must be  
25 separately bound by the court reporter and may not be disclosed to anyone except as permitted  
26 under this Stipulated Protective Order.

27 (g) the author or recipient of a document containing the information or a  
28 custodian or other person who otherwise possessed or knew the information.



1           8.       PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN  
2 OTHER LITIGATION

3           If a Party is served with a subpoena or a court order issued in other litigation that compels  
4 disclosure of any information or items designated in this action as “CONFIDENTIAL,” that  
5 Party must:

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

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

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

14           If the Designating Party timely seeks a protective order, the Party served with the  
15 subpoena or court order shall not produce any information designated in this action as  
16 “CONFIDENTIAL” before a determination by the court from which the subpoena or order  
17 issued, unless the Party has obtained the Designating Party’s permission. The Designating Party  
18 shall bear the burden and expense of seeking protection in that court of its confidential material –  
19 and nothing in these provisions should be construed as authorizing or encouraging a Receiving  
20 Party in this action to disobey a lawful directive from another court.

21           9.       A NON-PARTY’S PROTECTED MATERIAL SOUGHT TO BE PRODUCED  
22 IN THIS LITIGATION

23                   (a)     The terms of this Order are applicable to information produced by a Non  
24 Party in this action and designated as “CONFIDENTIAL.” Such information produced by Non-  
25 Parties in connection with this litigation is protected by the remedies and relief provided by this  
26 Order. Nothing in these provisions should be construed as prohibiting a Non-Party from seeking  
27 additional protections.

28                   (b)     In the event that a Party is required, by a valid discovery request, to

1 produce a Non-Party's confidential information in its possession, and the Party is subject to an  
2 agreement with the Non-Party not to produce the Non-Party's confidential information, then the  
3 Party shall:

4 1. promptly notify in writing the Requesting Party and the Non-Party  
5 that some or all of the information requested is subject to a confidentiality agreement with a  
6 Non-Party;

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

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

12 (c) If the Non-Party fails to object or seek a protective order from this court  
13 within 14 days of receiving the notice and accompanying information, the Receiving Party may  
14 produce the Non-Party's confidential information responsive to the discovery request. If the  
15 Non-Party timely seeks a protective order, the Receiving Party shall not produce any information  
16 in its possession or control that is subject to the confidentiality agreement with the Non-Party  
17 before a determination by the court.<sup>1</sup> Absent a court order to the contrary, the Non-Party shall  
18 bear the burden and expense of seeking protection in this court of its Protected Material.

19 10. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

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

27  
28 <sup>1</sup> The purpose of this provision is to alert the interested parties to the existence of confidentiality rights of a Non-Party and to afford the Non-Party an opportunity to protect its confidentiality interests in this court.

1           11.     INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE  
2 PROTECTED MATERIAL

3           When a Producing Party gives notice to Receiving Parties that certain inadvertently  
4 produced material is subject to a claim of privilege or other protection, the obligations of the  
5 Receiving Parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B). This  
6 provision is not intended to modify whatever procedure may be established in an e-discovery  
7 order that provides for production without prior privilege review. Pursuant to Federal Rule of  
8 Evidence 502(d) and (e), insofar as the parties reach an agreement on the effect of disclosure of a  
9 communication or information covered by the attorney-client privilege or work product  
10 protection, the parties may incorporate their agreement in the stipulated protective order  
11 submitted to the court.

12           12.     MISCELLANEOUS

13           12.1    Right to Further Relief.       Nothing in this Order abridges the right of  
14 any person to seek its modification by the court in the future.

15           12.2    Right to Assert Other Objections.    By stipulating to the entry of this  
16 Protective Order no Party waives any right it otherwise would have to object to disclosing or  
17 producing any information or item on any ground not addressed in this Stipulated Protective  
18 Order. Similarly, no Party waives any right to object on any ground to use in evidence of any of  
19 the material covered by this Protective Order.

20           12.3    Filing Protected Material.       Without written permission from the  
21 Designating Party or a court order secured after appropriate notice to all interested persons, a  
22 Party may not file in the public record in this action any Protected Material. A Party that seeks to  
23 file under seal any Protected Material must comply with Civil Local Rule 79-5. Protected  
24 Material may only be filed under seal pursuant to a court order authorizing the sealing of the  
25 specific Protected Material at issue. Pursuant to Civil Local Rule 79-5, a sealing order will issue  
26 only upon a request establishing that the Protected Material at issue is privileged, protectable as a  
27 trade secret, or otherwise entitled to protection under the law. If a Receiving Party's request to  
28 file Protected Material under seal pursuant to Civil Local Rule 79-5(d) is denied by the court,

1 then the Receiving Party may file the information in the public record pursuant to Civil Local  
2 Rule 79- 5(e) unless otherwise instructed by the court.

3 13. FINAL DISPOSITION. Within 60 days after the final disposition of this  
4 action, as defined in paragraph 4, each Receiving Party must return all Protected Material to the  
5 Producing Party or destroy such material. As used in this subdivision, "all Protected Material"  
6 includes all copies, abstracts, compilations, summaries, and any other format reproducing or  
7 capturing any of the Protected Material. Whether the Protected Material is returned or destroyed,  
8 the Receiving Party must submit a written certification to the Producing Party (and, if not the  
9 same person or entity, to the Designating Party) by the 60 day deadline that (1) identifies (by  
10 category, where appropriate) all the Protected Material that was returned or destroyed and (2)  
11 affirms that the Receiving Party has not retained any copies, abstracts, compilations, summaries  
12 or any other format reproducing or capturing any of the Protected Material. Notwithstanding this  
13 provision, Counsel are entitled to retain an archival copy of all pleadings, motion papers, trial,  
14 deposition, and hearing transcripts, legal memoranda, correspondence, deposition and trial  
15 exhibits, expert reports, attorney work product, and consultant and expert work product, even if  
16 such materials contain Protected Material. Any such archival copies that contain or constitute  
17 Protected Material remain subject to this Protective Order as set forth in Section 4  
18 (DURATION).

19  
20 **It is so stipulated.**

21  
22 Dated: September 17, 2010

GORDON & REES LLP

23  
24 By: /s/ Tad A. Devlin  
25 Tad A. Devlin  
26 Shannon L. Ross  
27 Attorneys for Defendant  
28 MORRISON & FOERSTER LLP LONG  
TERM DISABILITY PLAN

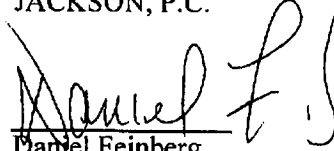
Gordon & Rees LLP  
275 Battery Street, Suite 2000  
San Francisco, CA 94111

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Dated: September 17, 2010

LEWIS, FEINBERG, LEE, RENAHER &  
JACKSON, P.C.

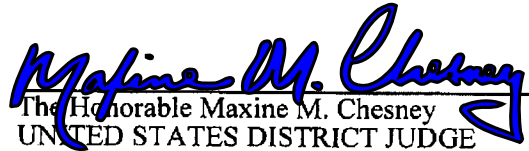
By:



Daniel Feinberg  
Nina Wasow  
Attorneys for Plaintiff  
GORDON ERSPAMER

PURSUANT TO STIPULATION, IT IS SO ORDERED.

Dated: September 28, 2010



The Honorable Maxine M. Chesney  
UNITED STATES DISTRICT JUDGE

Gordon & Rees LLP  
275 Battery Street, Suite 2000  
San Francisco, CA 94111

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EXHIBIT A

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, \_\_\_\_\_, of \_\_\_\_\_,  
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 Northern District of  
California on \_\_\_\_\_ in the case of *Gordon Erspamer v. Morrison & Foerster*  
*LLP Long Term Disability Plan*; C08-04692 MMC. 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  
Northern 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 \_\_\_\_\_ of \_\_\_\_\_ 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:  
\_\_\_\_\_

Signature:  
\_\_\_\_\_