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10 TECHNOLOGY, LLC; THERMALGUARD, LLC

8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA

11 ATS PRODUCTS, INC.,

12 **Plaintiff,**

13 v.

14 FRANK GHIORSO; THERMALGUARD  
15 TECHNOLOGY, LLC; THERMALGUARD, LLC,  
16 **Defendant.**

Case No. CV10-04880

STIPULATED PROTECTIVE ORDER  
FOR STANDARD LITIGATION

16 AND RELATED COUNTER-CLAIMS.

17  
18 1. PURPOSES AND LIMITATIONS

19 Disclosure and discovery activity in this action are likely to involve production of  
20 confidential, proprietary, or private information for which special protection from public  
21 disclosure and from use for any purpose other than prosecuting this litigation may be warranted.  
22 Accordingly, the parties hereby stipulate to and petition the court to enter the following Stipulated  
23 Protective Order. The parties acknowledge that this Order does not confer blanket protections on  
24 all disclosures or responses to discovery and that the protection it affords from public disclosure  
25 and use extends only to the limited information or items that are entitled to confidential treatment  
26 under the applicable legal principles. The parties further acknowledge, as set forth in Section  
27 12.3, below, that this Stipulated Protective Order does not entitle them to file confidential  
28 information under seal; Civil Local Rule 79-5 sets forth the procedures that must be followed and

1 the standards that will be applied when a party seeks permission from the court to file material  
2 under seal.

3 2. DEFINITIONS

4 2.1 Challenging Party: a Party or Non-Party that challenges the designation of  
5 information or items under this Order.

6 2.2 "CONFIDENTIAL" Information or Items: information (regardless of how  
7 it is generated, stored or maintained) or tangible things that qualify for protection under Federal  
8 Rule of Civil Procedure 26(c).

9 2.3 Counsel (without qualifier): Outside Counsel of Record and House  
10 Counsel (as well as their support staff).

11 2.4 Designating Party: a Party or Non-Party that designates information or  
12 items that it produces in disclosures or in responses to discovery as "CONFIDENTIAL."

13 2.5 Disclosure or Discovery Material: all items or information, regardless of  
14 the medium or manner in which it is generated, stored, or maintained (including, among other  
15 things, testimony, transcripts, and tangible things), that are produced or generated in disclosures  
16 or responses to discovery in this matter.

17 2.6 Expert: a person with specialized knowledge or experience in a matter  
18 pertinent to the litigation who has been retained by a Party or its counsel to serve as an expert  
19 witness or as a consultant in this action.

20 2.7 House Counsel: attorneys who are employees of a party to this action.  
21 House Counsel does not include Outside Counsel of Record or any other outside counsel.

22 2.8 Non-Party: any natural person, partnership, corporation, association, or  
23 other legal entity not named as a Party to this action.

24 2.9 Outside Counsel of Record: attorneys who are not employees of a party to  
25 this action but are retained to represent or advise a party to this action and have appeared in this  
26 action on behalf of that party or are affiliated with a law firm which has appeared on behalf of  
27 that party.

28 2.10 Party: any party to this action, including all of its officers, directors,

1 employees, consultants, retained experts, and Outside Counsel of Record (and their support  
2 staffs).

3           2.11 Producing Party: a Party or Non-Party that produces Disclosure or  
4 Discovery Material in this action.

5           2.12 Professional Vendors: persons or entities that provide litigation support  
6 services (e.g., photocopying, videotaping, translating, preparing exhibits or demonstrations, and  
7 organizing, storing, or retrieving data in any form or medium) and their employees and  
8 subcontractors.

9           2.13 Protected Material: any Disclosure or Discovery Material that is  
10 designated as "CONFIDENTIAL."

11           2.14 Receiving Party: a Party that receives Disclosure or Discovery Material  
12 from a Producing Party.

13           3. SCOPE

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

26           4. DURATION

27           Even after final disposition of this litigation, the confidentiality obligations  
28 imposed by this Order shall remain in effect until a Designating Party agrees otherwise in writing

1 or a court order otherwise directs. Final disposition shall be deemed to be the later of (1)  
2 dismissal of all claims and defenses in this action, with or without prejudice; and (2) final  
3 judgment herein after the completion and exhaustion of all appeals, rehearings, remands, trials, or  
4 reviews of this action, including the time limits for filing any motions or applications for  
5 extension of time pursuant to applicable law.

6 5. DESIGNATING PROTECTED MATERIAL

7 5.1 Exercise of Restraint and Care in Designating Material for Protection.

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

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

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

21 5.2 Manner and Timing of Designations. Except as otherwise provided in this  
22 Order (see, e.g., second paragraph of section 5.2(a) below), or as otherwise stipulated or ordered,  
23 Disclosure or Discovery Material that qualifies for protection under this Order must be clearly so  
24 designated before the material is disclosed or produced.

25 Designation in conformity with this Order requires:

26 (a) for information in documentary form (e.g., paper or electronic documents, but  
27 excluding transcripts of depositions or other pretrial or trial proceedings), that the Producing  
28 Party affix the legend "CONFIDENTIAL" to each page that contains protected material. If only

1 a portion or portions of the material on a page qualifies for protection, the Producing Party also  
2 must clearly identify the protected portion(s) (e.g., by making appropriate markings in the  
3 margins).

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

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

18 (c) for information produced in some form other than documentary and for any  
19 other tangible items, that the Producing Party affix in a prominent place on the exterior of the  
20 container or containers in which the information or item is stored the legend "CONFIDENTIAL."  
21 If only a portion or portions of the information or item warrant protection, the Producing Party, to  
22 the extent practicable, shall identify the protected portion(s).

23 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent  
24 failure to designate qualified information or items does not, standing alone, waive the Designating  
25 Party's right to secure protection under this Order for such material. Upon timely correction of a  
26 designation, the Receiving Party must make reasonable efforts to assure that the material is  
27 treated in accordance with the provisions of this Order.

28 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

1           6.1 Timing of Challenges. Any Party or Non-Party may challenge a  
2 designation of confidentiality at any time. Unless a prompt challenge to a Designating Party's  
3 confidentiality designation is necessary to avoid foreseeable, substantial unfairness, unnecessary  
4 economic burdens, or a significant disruption or delay of the litigation, a Party does not waive its  
5 right to challenge a confidentiality designation by electing not to mount a challenge promptly  
6 after the original designation is disclosed.

7           6.2 Meet and Confer. The Challenging Party shall initiate the dispute  
8 resolution process by providing written notice of each designation it is challenging and describing  
9 the basis for each challenge. To avoid ambiguity as to whether a challenge has been made, the  
10 written notice must recite that the challenge to confidentiality is being made in accordance with  
11 this specific paragraph of the Protective Order. The parties shall attempt to resolve each  
12 challenge in good faith and must begin the process by conferring directly (in voice to voice  
13 dialogue; other forms of communication are not sufficient) within 14 days of the date of service  
14 of notice. In conferring, the Challenging Party must explain the basis for its belief that the  
15 confidentiality designation was not proper and must give the Designating Party an opportunity to  
16 review the designated material, to reconsider the circumstances, and, if no change in designation  
17 is offered, to explain the basis for the chosen designation. A Challenging Party may proceed to  
18 the next stage of the challenge process only if it has engaged in this meet and confer process first  
19 or establishes that the Designating Party is unwilling to participate in the meet and confer process  
20 in a timely manner.

21           6.3 Judicial Intervention. If the Parties cannot resolve a challenge without  
22 court intervention, the Designating Party shall file and serve a motion to retain confidentiality  
23 under Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5, if applicable) within 21  
24 days of the initial notice of challenge or within 14 days of the parties agreeing that the meet and  
25 confer process will not resolve their dispute, whichever is earlier. Each such motion must be  
26 accompanied by a competent declaration affirming that the movant has complied with the meet  
27 and confer requirements imposed in the preceding paragraph. Failure by the Designating Party to  
28 make such a motion including the required declaration within 21 days (or 14 days, if applicable)

1 shall automatically waive the confidentiality designation for each challenged designation. In  
2 addition, the Challenging Party may file a motion challenging a confidentiality designation at any  
3 time if there is good cause for doing so, including a challenge to the designation of a deposition  
4 transcript or any portions thereof. Any motion brought pursuant to this provision must be  
5 accompanied by a competent declaration affirming that the movant has complied with the meet  
6 and confer requirements imposed by the preceding paragraph.

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

14           7.     ACCESS TO AND USE OF PROTECTED MATERIAL

15           7.1    Basic Principles. A Receiving Party may use Protected Material that is  
16 disclosed or produced by another Party or by a Non-Party in connection with this case only for  
17 prosecuting, defending, or attempting to settle this litigation. Such Protected Material may be  
18 disclosed only to the categories of persons and under the conditions described in this Order.  
19 When the litigation has been terminated, a Receiving Party must comply with the provisions of  
20 section 13 below (FINAL DISPOSITION).

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

24           7.2    Disclosure of "CONFIDENTIAL" Information or Items. Unless otherwise  
25 ordered by the court or permitted in writing by the Designating Party, a Receiving Party may  
26 disclose any information or item designated "CONFIDENTIAL" only to:

27           (a) the Receiving Party's Outside Counsel of Record in this action, as well as  
28 employees of said Outside Counsel of Record to whom it is reasonably necessary to disclose the

1 information for this litigation and who have signed the “Acknowledgment and Agreement to Be  
2 Bound” that is attached hereto as Exhibit A;

3 (b) the officers, directors, and employees (including House Counsel) of the  
4 Receiving Party to whom disclosure is reasonably necessary for this litigation and who have  
5 signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A);

6 (c) Experts (as defined in this Order) of the Receiving Party to whom disclosure is  
7 reasonably necessary for this litigation and who have signed the “Acknowledgment and  
8 Agreement to Be Bound” (Exhibit A);

9 (d) the court and its personnel;

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

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

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

21 8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN  
22 OTHER LITIGATION

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

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

28 (b) promptly notify in writing the party who caused the subpoena or order to issue



1 in the other litigation that some or all of the material covered by the subpoena or order is subject  
2 to this Protective Order. Such notification shall include a copy of this Stipulated Protective  
3 Order; and

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

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

13 9. A NON-PARTY'S PROTECTED MATERIAL SOUGHT TO BE  
14 PRODUCED IN THIS LITIGATION

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

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

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

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

1 description of the information requested; and

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

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

11 10. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

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

19 11. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE  
20 PROTECTED MATERIAL

21 When a Producing Party gives notice to Receiving Parties that certain  
22 inadvertently produced material is subject to a claim of privilege or other protection, the  
23 obligations of the Receiving Parties are those set forth in Federal Rule of Civil Procedure  
24 26(b)(5)(B). This provision is not intended to modify whatever procedure may be established in  
25 an e-discovery order that provides for production without prior privilege review. Pursuant to  
26

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 Federal Rule of Evidence 502(d) and (e), insofar as the parties reach an agreement on the effect of  
2 disclosure of a communication or information covered by the attorney-client privilege or work  
3 product protection, the parties may incorporate their agreement in the stipulated protective order  
4 submitted to the court.

5 12. MISCELLANEOUS

6 12.1 Right to Further Relief. Nothing in this Order abridges the right of any  
7 person to seek its modification by the court in the future.

8 12.2 Right to Assert Other Objections. By stipulating to the entry of this  
9 Protective Order no Party waives any right it otherwise would have to object to disclosing or  
10 producing any information or item on any ground not addressed in this Stipulated Protective  
11 Order. Similarly, no Party waives any right to object on any ground to use in evidence of any of  
12 the material covered by this Protective Order.

13 12.3 Filing Protected Material. Without written permission from the  
14 Designating Party or a court order secured after appropriate notice to all interested persons, a  
15 Party may not file in the public record in this action any Protected Material. A Party that seeks to  
16 file under seal any Protected Material must comply with Civil Local Rule 79-5. Protected  
17 Material may only be filed under seal pursuant to a court order authorizing the sealing of the  
18 specific Protected Material at issue. Pursuant to Civil Local Rule 79-5, a sealing order will issue  
19 only upon a request establishing that the Protected Material at issue is privileged, protectable as a  
20 trade secret, or otherwise entitled to protection under the law. If a Receiving Party's request to  
21 file Protected Material under seal pursuant to Civil Local Rule 79-5(d) is denied by the court, then  
22 the Receiving Party may file the information in the public record pursuant to Civil Local Rule 79-  
23 5(e) unless otherwise instructed by the court.

24 13. FINAL DISPOSITION. Within 60 days after the final disposition of this action,  
25 as defined in paragraph 4, each Receiving Party must return all Protected Material to the  
26 Producing Party or destroy such material. As used in this subdivision, "all Protected Material"  
27 includes all copies, abstracts, compilations, summaries, and any other format reproducing or  
28 capturing any of the Protected Material. Whether the Protected Material is returned or destroyed,

1 the Receiving Party must submit a written certification to the Producing Party (and, if not the  
 2 same person or entity, to the Designating Party) by the 60 day deadline that (1) identifies (by  
 3 category, where appropriate) all the Protected Material that was returned or destroyed and  
 4 (2)affirms that the Receiving Party has not retained any copies, abstracts, compilations,  
 5 summaries or any other format reproducing or capturing any of the Protected Material.  
 6 Notwithstanding this provision, Counsel are entitled to retain an archival copy of all pleadings,  
 7 motion papers, trial, deposition, and hearing transcripts, legal memoranda, correspondence,  
 8 deposition and trial exhibits, expert reports, attorney work product, and consultant and expert  
 9 work product, even if such materials contain Protected Material. Any such archival copies that  
 10 contain or constitute Protected Material remain subject to this Protective Order as set forth in  
 11 Section 4 (DURATION).

12  
13  
14  
15 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

16 DATED: 1/13/11 Mark L. Lee  
17 Attorneys for Plaintiff

18 DATED: 1/13/11 John P. ...  
19 Attorneys for Defendant

20 PURSUANT TO STIPULATION, IT IS SO ORDERED.

21 DATED: January 14, 2011 Bernard Zimmerman  
22 [Name of Judge] Bernard Zimmerman  
23 United States District/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 Northern District of California on [date] in the case of \_\_\_\_\_ [insert formal name of the case and the number and initials assigned to it by the court]. 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 \_\_\_\_\_ [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]