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 GROUPON, INC.

7
 8 UNITED STATES DISTRICT COURT
 9 NORTHERN DISTRICT OF CALIFORNIA
 10 SAN FRANCISCO DIVISION

12 GROUION, LLC, a California limited
 liability company,

13 Plaintiff,

14 v.

15 GROUPON, INC., a Delaware corporation,
 16 THE POINT, INC., a Delaware corporation,
 and GOOGLE, INC., a Delaware corporation,

17 Defendants.
 18

CASE NO. 3:11-cv-00870-JSW

STIPULATED PROTECTIVE ORDER

FENWICK & WEST LLP
 ATTORNEYS AT LAW
 SAN FRANCISCO

19
 20 **1. PURPOSES AND LIMITATIONS**

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

1 Section 14.4, below, that this Stipulated Protective Order does not entitle them to file confidential
2 information under seal; Civil Local Rule 79-5 sets forth the procedures that must be followed and
3 the standards that will be applied when a party seeks permission from the court to file material
4 under seal.

5 **2. DEFINITIONS**

6 2.1. Challenging Party: a Party or Non-Party that challenges the designation of
7 information or items under this Order.

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

11 2.3. Counsel (without qualifier): Outside Counsel of Record and House Counsel (as
12 well as their support staff).

13 2.4. Designating Party: a Party or Non-Party that designates information or items that
14 it produces in disclosures or in responses to discovery as “CONFIDENTIAL” or “HIGHLY
15 CONFIDENTIAL — ATTORNEYS’ EYES ONLY”.

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

20 2.6. Expert: a person with specialized knowledge or experience in a matter pertinent to
21 the litigation who (1) has been retained by a Party or its counsel to serve as an expert witness or
22 as a consultant in this action, (2) is not a past or current employee of a Party or of a Party’s
23 competitor, and (3) at the time of retention, is not anticipated to become an employee of a Party
24 or of a Party’s competitor.

25 2.7. “HIGHLY CONFIDENTIAL — ATTORNEYS’ EYES ONLY” Information or
26 Items: extremely sensitive “Confidential Information or Items,” disclosure of which to another
27 Party or Non-Party would create a substantial risk of serious harm that could not be avoided by
28 less restrictive means.

1 2.8. House Counsel: attorneys who are employees of a party to this action. House
2 Counsel does not include Outside Counsel of Record or any other outside counsel.

3 2.9. Non-Party: any natural person, partnership, corporation, association, or other legal
4 entity not named as a Party to this action.

5 2.10. Outside Counsel of Record: attorneys who are not employees of a party to this
6 action but are retained to represent or advise a party to this action and have appeared in this action
7 on behalf of that party or are affiliated with a law firm which has appeared on behalf of that party.

8 2.11. Party: any party to this action, including all of its officers, directors, employees,
9 consultants, retained experts, and Outside Counsel of Record (and their support staffs).

10 2.12. Producing Party: a Party or Non-Party that produces Disclosure or Discovery
11 Material in this action.

12 2.13. Professional Vendors: persons or entities that provide litigation support services
13 (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 2.14. Protected Material: any Disclosure or Discovery Material that is designated as
17 “CONFIDENTIAL,” or as “HIGHLY CONFIDENTIAL — ATTORNEYS’ EYES ONLY.”

18 2.15. Receiving Party: a Party that receives Disclosure or Discovery Material from a
19 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;
23 (2) 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, re-hearings, 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. Each Party
 15 or Non-Party that designates information or items for protection under this Order must take care
 16 to limit any such designation to specific material that qualifies under the appropriate standards.
 17 To the extent it is practical to do so, the Designating Party must designate for protection only
 18 those parts of material, documents, items, or oral or written communications that qualify — so
 19 that other portions of the material, documents, items, or communications for which protection is
 20 not warranted are not swept unjustifiably within the ambit of this Order.

21 Mass, indiscriminate, or routinized designations are prohibited. Designations that are
 22 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 designated
 26 for protection do not qualify for protection at all or do not qualify for the level of protection
 27 initially asserted, that Designating Party must promptly notify all other parties that it is
 28 withdrawing the mistaken designation.

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

5 Designation in conformity with this Order requires:

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

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

26 (b) for testimony given in deposition or in other pretrial or trial proceedings,
27 that the Designating Party identify on the record, before the close of the deposition, hearing, or
28 other proceeding, all protected testimony and specify the level of protection being asserted.

1 When it is impractical to identify separately each portion of testimony that is entitled to protection
 2 and it appears that substantial portions of the testimony may qualify for protection, the
 3 Designating Party may invoke on the record (before the deposition, hearing, or other proceeding
 4 is concluded) a right to have up to 21 days to identify the specific portions of the testimony as to
 5 which protection is sought and to specify the level of protection being asserted. Only those
 6 portions of the testimony that are appropriately designated for protection within the 21 days shall
 7 be covered by the provisions of this Stipulated Protective Order. Alternatively, a Designating
 8 Party may specify, at the deposition or up to 21 days afterwards if that period is properly invoked,
 9 that the entire transcript shall be treated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL
 10 —ATTORNEYS’ EYES ONLY.”

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

17 Transcripts containing Protected Material shall have an obvious legend on the title page
 18 that the transcript contains Protected Material, and the title page shall be followed by a list of all
 19 pages (including line numbers as appropriate) that have been designated as Protected Material and
 20 the level of protection being asserted by the Designating Party. The Designating Party shall
 21 inform the court reporter of these requirements. Any transcript that is prepared before the
 22 expiration of a 21-day period for designation shall be treated during that period as if it had been
 23 designated “HIGHLY CONFIDENTIAL — ATTORNEYS’ EYES ONLY” in its entirety unless
 24 otherwise agreed. After the expiration of that period, the transcript shall be treated only as
 25 actually designated.

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

1 or “HIGHLY CONFIDENTIAL — ATTORNEYS’ EYES ONLY”. If only a portion or portions
 2 of the information or item warrant protection, the Producing Party, to the extent practicable, shall
 3 identify the protected portion(s) and specify the level of protection being asserted.

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

9 **6. CHALLENGING CONFIDENTIALITY DESIGNATIONS**

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

16 6.2. Meet and Confer. The Challenging Party shall initiate the dispute resolution
 17 process by providing written notice of each designation it is challenging and describing the basis
 18 for each challenge. To avoid ambiguity as to whether a challenge has been made, the written
 19 notice must recite that the challenge to confidentiality is being made in accordance with this
 20 specific paragraph of the Protective Order. The parties shall attempt to resolve each challenge in
 21 good faith and must begin the process by conferring directly (in voice to voice dialogue; other
 22 forms of communication are not sufficient) within 14 days of the date of service of notice. In
 23 conferring, the Challenging Party must explain the basis for its belief that the confidentiality
 24 designation was not proper and must give the Designating Party an opportunity to review the
 25 designated material, to reconsider the circumstances, and, if no change in designation is offered,
 26 to explain the basis for the chosen designation. A Challenging Party may proceed to the next
 27 stage of the challenge process only if it has engaged in this meet and confer process first or
 28

1 establishes that the Designating Party is unwilling to participate in the meet and confer process in
2 a timely manner.

3 6.3. Judicial Intervention. If the Parties cannot resolve a challenge without court
4 intervention, the Designating Party shall file and serve a motion to retain confidentiality under
5 Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5, if applicable) within 21 days
6 of the initial notice of challenge or within 14 days of the parties agreeing that the meet and confer
7 process will not resolve their dispute, whichever is earlier.¹ Each such motion must be
8 accompanied by a competent declaration affirming that the movant has complied with the meet
9 and confer requirements imposed in the preceding paragraph. Failure by the Designating Party to
10 make such a motion including the required declaration within 21 days (or 14 days, if applicable)
11 shall automatically waive the confidentiality designation for each challenged designation. In
12 addition, the Challenging Party may file a motion challenging a confidentiality designation at any
13 time if there is good cause for doing so, including a challenge to the designation of a deposition
14 transcript or any portions thereof. Any motion brought pursuant to this provision must be
15 accompanied by a competent declaration affirming that the movant has complied with the meet
16 and confer requirements imposed by the preceding paragraph.

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

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27 ¹ *Alternative*: It may be appropriate in certain circumstances for the parties to agree to shift the burden to move on
28 the Challenging Party after a certain number of challenges are made to avoid an abuse of the process. The burden of
persuasion would remain on the Designating Party.

1 **7. ACCESS TO AND USE OF PROTECTED MATERIAL**

2 7.1. Basic Principles. Materials and testimony provided in discovery in this action may
3 be used only for prosecuting, defending, or attempting to settle this litigation. A Receiving Party
4 may use Protected Material that is disclosed or produced by another Party or by a Non-Party in
5 connection with this case only for prosecuting, defending, or attempting to settle this litigation.
6 Such Protected Material may be disclosed only to the categories of persons and under the
7 conditions described in this Order. When the litigation has been terminated, a Receiving Party
8 must comply with the provisions of Section 15 below (FINAL DISPOSITION).

9 Protected Material must be stored and maintained by a Receiving Party at a location and
10 in a secure manner² that ensures that access is limited to the persons authorized under this Order.

11 7.2. Disclosure of "CONFIDENTIAL" Information or Items. Unless otherwise
12 ordered by the court or permitted in writing by the Designating Party, a Receiving Party may
13 disclose any information or item designated "CONFIDENTIAL" only to:

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

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

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

24 (d) the court and its personnel;

25
26
27 _____
28 ² It may be appropriate under certain circumstances to require the Receiving Party to store any electronic Protected
Material in password-protected form.

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

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

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

12 7.3. Disclosure of “HIGHLY CONFIDENTIAL — ATTORNEYS’ EYES ONLY”

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

16 (a) the Receiving Party’s Outside Counsel of Record in this action, as well as
 17 employees of said Outside Counsel of Record to whom it is reasonably necessary to disclose the
 18 information for this litigation and who have signed the “Acknowledgment and Agreement to Be
 19 Bound” that is attached hereto as Exhibit A;

20 (b) House Counsel of the Receiving Party to whom disclosure is reasonably
 21 necessary for this litigation, and who has signed the “Acknowledgment and Agreement to Be
 22 Bound” (Exhibit A);

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

27 (d) the court and its personnel;

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1 (e) court reporters and their staff, professional jury or trial consultants,³ and
 2 Professional Vendors to whom disclosure is reasonably necessary for this litigation and who have
 3 signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A); and

4 (f) the author or recipient of a document containing the information or a
 5 custodian or other person who otherwise possessed or knew the information.

6 7.4. Procedures for Approving or Objecting to Disclosure of “HIGHLY
 7 CONFIDENTIAL — ATTORNEYS’ EYES ONLY” Information or Items to Designated Experts.

8 (1) Unless otherwise ordered by the court or agreed to in writing by the
 9 Designating Party, a Party that seeks to disclose to an Expert (as defined in this Order) any
 10 information or item that has been designated “HIGHLY CONFIDENTIAL — ATTORNEYS’
 11 EYES ONLY” pursuant to paragraph 7.3(c) first must make a written request to the Designating
 12 Party that (1) sets forth the full name of the Expert and the city and state of his or her primary
 13 residence, (2) attaches a copy of the Expert’s current resume, (3) identifies the Expert’s current
 14 employer(s), and (4) identifies (by name and number of the case, filing date, and location of
 15 court) any litigation in connection with which the Expert has been disclosed to the adverse party
 16 or has offered expert testimony, including through a declaration, report, or testimony at a
 17 deposition or trial or arbitration, during the preceding four years.

18 (a) A Party that makes a request and provides the information specified in the
 19 preceding respective paragraphs may disclose the subject Protected Material to the identified
 20 Expert unless, within 14 days of delivering the request, the Party receives a written objection
 21 from the Designating Party. Any such objection must set forth in detail the grounds on which it is
 22 based.

23 (b) A Party that receives a timely written objection must meet and confer with
 24 the Designating Party (through direct voice to voice dialogue) to try to resolve the matter by
 25 agreement within seven days of the written objection. If no agreement is reached, the Party
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27 ³ *Alternative:* The parties may wish to allow disclosure of information not only to professional jury or trial
 28 consultants, but also to mock jurors, to further trial preparation. In that situation, the parties may wish to draft a
 simplified, precisely tailored Undertaking for mock jurors to sign.

1 seeking to make the disclosure to the Expert may file a motion as provided in Civil Local Rule 7
 2 (and in compliance with Civil Local Rule 79-5, if applicable) seeking permission from the court
 3 to do so. Any such motion must describe the circumstances with specificity, set forth in detail the
 4 reasons why the disclosure to the Expert is reasonably necessary, assess the risk of harm that the
 5 disclosure would entail, and suggest any additional means that could be used to reduce that risk.
 6 In addition, any such motion must be accompanied by a competent declaration describing the
 7 parties' efforts to resolve the matter by agreement (i.e., the extent and the content of the meet and
 8 confer discussions) and setting forth the reasons advanced by the Designating Party for its refusal
 9 to approve the disclosure.

10 In any such proceeding, the Party opposing disclosure to the Expert shall bear the burden
 11 of proving that the risk of harm that the disclosure would entail (under the safeguards proposed)
 12 outweighs the Receiving Party's need to disclose the Protected Material to its Designated Expert.

13
 14 **8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN**
 15 **OTHER LITIGATION**

16 If a Party is served with a subpoena or a court order issued in other litigation that compels
 17 disclosure of any information or items designated in this action as "CONFIDENTIAL" or
 18 "HIGHLY CONFIDENTIAL — ATTORNEYS' EYES ONLY" that Party must:

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

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

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

27 ⁴ The purpose of imposing these duties is to alert the interested parties to the existence of this Protective Order and to
 28 afford the Designating Party in this case an opportunity to try to protect its confidentiality interests in the court from
 which the subpoena or order issued.

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

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

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

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

- 20 1. promptly notify in writing the Requesting Party and the Non-Party
 21 that some or all of the information requested is subject to a confidentiality agreement with a Non-
 22 Party;
- 23 2. promptly provide the Non-Party with a copy of the Stipulated
 24 Protective Order in this litigation, the relevant discovery request(s), and a reasonably specific
 25 description of the information requested; and
- 26 3. make the information requested available for inspection by the
 27 Non-Party.

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

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 Stipulated Protective
11 Order, the Receiving Party must immediately (a) notify in writing the Designating Party of the
12 unauthorized disclosures, (b) use its best efforts to retrieve all unauthorized copies of the
13 Protected Material, (c) inform the person or persons to whom unauthorized disclosures were
14 made of all the terms of this Order, and (d) request such person or persons to execute the
15 "Acknowledgment and Agreement to Be Bound" that is attached hereto as Exhibit A.

16 **11. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE**
17 **PROTECTED MATERIAL**

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

1 **12. MISCELLANEOUS**

2 12.1. Right to Further Relief. Nothing in this Order abridges the right of any person to
3 seek its modification by the court in the future.

4 12.2. Right to Assert Other Objections. By stipulating to the entry of this Protective
5 Order no Party waives any right it otherwise would have to object to disclosing or producing any
6 information or item on any ground not addressed in this Stipulated Protective Order. Similarly,
7 no Party waives any right to object on any ground to use in evidence of any of the material
8 covered by this Protective Order.

9 12.3. Filing Protected Material. Without written permission from the Designating Party
10 or a court order secured after appropriate notice to all interested persons, a Party may not file in
11 the public record in this action any Protected Material. A Party that seeks to file under seal any
12 Protected Material must comply with Civil Local Rule 79-5. Protected Material may only be
13 filed under seal pursuant to a court order authorizing the sealing of the specific Protected Material
14 at issue. Pursuant to Civil Local Rule 79-5, a sealing order will issue only upon a request
15 establishing that the Protected Material at issue is privileged, protectable as a trade secret, or
16 otherwise entitled to protection under the law. If a Receiving Party's request to file Protected
17 Material under seal pursuant to Civil Local Rule 79-5(d) is denied by the court, then the
18 Receiving Party may file the Protected Material in the public record pursuant to Civil Local Rule
19 79-5(e) unless otherwise instructed by the court.

20 **13. FINAL DISPOSITION**

21 Within 60 days after the final disposition of this action, as defined in paragraph 4, each
22 Receiving Party must return or destroy all Protected Material to the Producing Party or destroy
23 such material. As used in this subdivision, "all Protected Material" includes all copies, abstracts,
24 compilations, summaries, and any other format reproducing or capturing any of the Protected
25 Material. Whether the Protected Material is returned or destroyed, the Receiving Party must
26 submit a written certification to the Producing Party (and, if not the same person or entity, to the
27 Designating Party) by the 60 day deadline that (1) identifies all the Protected Material that was
28 returned or destroyed and (2) affirms that the Receiving Party has not retained any copies,

1 abstracts, compilations, summaries or any other format reproducing or capturing any of the
2 Protected Material except as permitted under this Order. Notwithstanding this provision, Counsel
3 are entitled to retain an archival copy of all pleadings, motion papers, trial, deposition, and
4 hearing transcripts, legal memoranda, correspondence, deposition and trial exhibits, expert
5 reports, attorney work product, and consultant and expert work product, even if such materials
6 contain Protected Material. Any such archival copies that contain or constitute Protected Material
7 remain subject to this Protective Order as set forth in Section 4 (DURATION). In addition, this
8 provision does not require the Receiving Party to search through or delete automatically
9 generated computer backup files that are created for disaster recovery purposes (e.g., computer
10 backup tapes), if such files are not readily accessible.

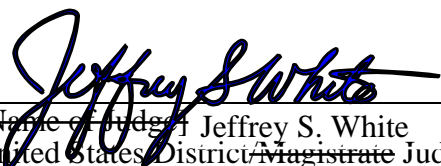
11 **IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.**

13 DATED: July 15, 2011 /s/ Jack Russo
Attorneys for Plaintiff

15 DATED: July 15, 2011 /s/ Jedediah Wakefield
Attorneys for Defendant

17 **PURSUANT TO STIPULATION, IT IS SO ORDERED.**

19 DATED: July 20, 2011, 2011



[Name of Judge] Jeffrey S. White
United States District Magistrate Judge

FENWICK & WEST LLP
ATTORNEYS AT LAW
SAN FRANCISCO

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ATTORNEY ATTESTATION

In accordance with the Court’s General Order No. 45, dated November 18, 2004, I hereby attest that concurrence in the filing of this document has been obtained from the signatories indicated by a ‘conformed’ signature (/s/) within this e-filed document.

/s/ Jedediah Wakefield
Jedediah Wakefield

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ATTORNEYS AT LAW
SAN FRANCISCO

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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 _____, 2011 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: _____, 2011

City and State where sworn and signed: _____

Printed name: _____
[printed name]

Signature: _____
[signature]