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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

KEVIN FAULK, on behalf of himself
and all others similarly situated,

Plaintiff,

v.

SEARS, ROEBUCK AND CO.,

Defendant.

Case Number: 3:11-CV-02159-SI

**STIPULATED PROTECTIVE ORDER
RE: CONFIDENTIALITY**

1. PURPOSES AND LIMITATIONS

WHEREAS, disclosure and discovery activity in this action may result in production of information of a confidential, proprietary, trade secret, or private nature, for which special protection from public disclosure and from use for any purpose other than prosecuting this litigation would be warranted; and

1 WHEREAS, this Stipulated Protective Order re: Confidentiality (the “Protective Order” or
2 “Order”) does not confer blanket protections on all disclosures or responses to discovery and
3 protects only the limited categories of information or items that are entitled under the applicable
4 legal principles to treatments as confidential; and

5 WHEREAS, this Protective Order creates no entitlement to file confidential information
6 under seal, and incorporates and applies the standards and procedures of Civil Local Rule 79-5 and
7 General Order 62 that will be applied when a party seeks permission from the Court to file material
8 under seal;

9 Accordingly, IT IS HEREBY STIPULATED by and between the parties, subject to Court
10 approval, that the following Protective Order shall be issued in this action.

11 **2. DEFINITIONS**

12 2.1 “Party” shall mean any party to this action, including all of its officers, directors,
13 employees, consultants, retained experts, and counsel.

14 2.2 “Disclosure or Discovery Material” shall mean all items or information, regardless of
15 the medium or manner generated, stored, or maintained (including, among other things, testimony,
16 transcripts, or tangible things) that are produced or generated in disclosures or responses to
17 discovery in this matter.

18 2.3 “Confidential Information or Items” shall mean information (regardless of how
19 generated, stored or maintained) or tangible things that qualify for protection under standards
20 developed under Fed. R. Civ. P. 26(c).

21 2.4 “Highly Confidential – Attorneys’ Eyes Only Information or Items” shall mean: (a)
22 Confidential Information that individually identifies any person and discloses material of a personal
23 or private nature; (b) Confidential Information that individually identifies any customer, supplier,
24 prospective customer or prospective supplier; (c) Confidential Information containing trade secrets
25 or proprietary information as defined under California law, including but not limited to Confidential
26 Information that reveals current or future business plans, forecasts, and competitive strategies or
27 non-public financial information that appropriately warrants a heightened degree of confidentiality
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1 protection; or (d) such other categories of Confidential Information or Items as the parties may
2 mutually agree upon or which, absent such agreement, the Court may include herein upon a motion
3 showing the information or items constitute extremely sensitive Confidential Information or Items
4 whose disclosure to a person or entity other than Counsel would create a substantial risk of serious
5 harm that could not be avoided by less restrictive means.

6 2.5 “Receiving Party” shall mean a Party that receives Disclosure or Discovery Material
7 from a Producing Party.

8 2.6 “Producing Party” shall mean a Party or non-party that produces Disclosure or
9 Discovery material in this action.

10 2.7 “Designating Party” shall mean a Party or non-party that designates information or
11 items that it produces in disclosures or in response to discovery as “Confidential” or “Highly
12 Confidential – Attorneys’ Eyes Only.”

13 2.8 “Protected Material” shall mean any Disclosure or Discovery Material that is
14 designated as “Confidential” or as “Highly Confidential – Attorneys’ Eyes Only.”

15 2.9 “Outside Counsel” shall mean attorneys who are not employees of a party but who
16 are retained to represent or advise a party in this action.

17 2.10 “House Counsel” shall mean attorneys who are employees of a party.

18 2.11 “Counsel” (without qualifier) shall mean Outside Counsel and House Counsel as
19 well as their staff providing services concerning this action.

20 2.12 “Expert” shall mean persons not regularly employed by Counsel but who are
21 employed or expressly retained by the parties or their Counsel, whether paid or not, to assist in the
22 preparation of this action for trial, including, but not limited to, accountants, economists,
23 statisticians and other types of experts.

24 2.13 “Professional Vendors” shall mean persons or entities that provide litigation support
25 services (*e.g.*, videotaping, translating, preparing exhibits or demonstrations, organizing, storing,
26 retrieving data in any form or medium, etc.) and their employees and subcontractors providing
27 services concerning this action.

28

1 **3. SCOPE**

2 3.1 The protections conferred by this Order cover not only Protected Material (as
3 defined above), but also any information copied or extracted therefrom, as well as all copies,
4 excerpts, summaries, or compilations thereof; plus testimony, conversations or presentations by
5 parties or counsel to or in Court or in other settings that publicly reveal Protected Material.

6 **4. DURATION**

7 4.1 Even after the termination of this litigation, the confidentiality obligations imposed
8 by this Order shall remain in effect until a Designating Party agrees otherwise in writing or a court
9 order otherwise directs. After the termination of this action, the Court shall retain jurisdiction to
10 issue any further orders that may be required to preserve the confidentiality of any Protected
11 Material.

12 **5. DESIGNATING PROTECTED MATERIAL**

13 5.1 Exercise of Restraint and Care in Designating Material for Protection. Each Party or
14 non-party that designates information or items for protection under this Order must exercise
15 reasonable and appropriate care to limit any such designation to specific material that qualifies
16 under the appropriate standards. A Designating Party must exercise reasonable and appropriate care
17 to designate for protection only those specific portions of material, documents, items, or oral or
18 written communications that qualify for protection, and to ensure that other portions of the material,
19 documents, items, or communications for which protection is not warranted are not swept
20 unjustifiably within the ambit of the designation. Mass, indiscriminate, or routinized designations
21 are prohibited. Designations that are shown to be clearly unjustified, or that have been made for an
22 improper purpose (*e.g.*, unnecessarily to encumber or retard the case development process, or to
23 impose unnecessary expenses and burdens on another Party or Parties), expose the Designating
24 Party to sanctions. If it comes to a Party's or a non-party's attention that information or items that it
25 designated for protection do not qualify for protection, or do not qualify for the level of protection
26 initially asserted, that Party or non-party must promptly notify all other parties that it is withdrawing
27 the erroneous designation.
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1 5.2 Manner and Timing of Designation. Except as otherwise provided in this Order (*see*,
2 *e.g.*, ¶5.2(a), second paragraph below), or as otherwise stipulated or ordered, material that qualifies
3 for protection under this Order must be clearly so designated before the material is disclosed or
4 produced. Designation in conformity with this Order requires:

5 (a) For information in documentary form (apart from transcripts of depositions
6 or other pretrial or trial proceedings), the Producing Party must affix the legend “Confidential” or
7 “Highly Confidential – Attorneys’ Eyes Only” at the bottom of each page that contains Protected
8 Material. If only a portion or portions of the material on a page qualifies for protection, the
9 Producing Party also must clearly identify the protected portion(s) (*e.g.*, by making appropriate
10 markings in the margins) and must specify, for each portion the level of protection being asserted
11 (either “Confidential” or “Highly Confidential” – Attorneys’ Eyes Only”).

12 A Party or non-party that makes original documents or materials available for inspection
13 need not designate them for protection until after the Receiving Party has indicated which material
14 it would like copied and produced. During the inspection and before the designation, all of the
15 material made available for inspection shall be deemed “Highly Confidential – Attorneys’ Eyes
16 Only.” After the inspecting Party has identified the documents it wants copied and produced, the
17 Producing Party must determine which documents, or portions thereof, qualify for protection under
18 this Order; and before producing the specified documents the Producing Party must affix the
19 appropriate designation (“Confidential” or “Highly Confidential – Attorneys’ Eyes Only”) at the
20 bottom of each page that contains Protected Material. If only a portion or portions of the material
21 on a page qualifies for protection, the Producing Party also must clearly identify the protected
22 portion(s) (*e.g.*, by making appropriate markings in the margins) and must specify, for each portion,
23 the level of protection being asserted (either “Confidential” or “Highly Confidential – Attorneys’
24 Eyes Only”).

25 (b) For testimony given in deposition or in other pretrial or trial proceedings, the
26 Designating Party shall identify the protected testimony on the record, before the close of the
27 deposition, hearing, or other proceeding, and shall further specify any portions of the testimony that
28 qualify as either “Confidential” or “Highly Confidential – Attorneys’ Eyes Only.” When it is

1 impractical separately to identify each portion of the testimony that is entitled to protection, and
2 when it appears that substantial portions of the testimony may qualify for protection, the
3 Designating Party may invoke on the record (before the deposition or proceeding is concluded) a
4 right to have up to twenty (20) days after the transcript volume containing the testimony to be
5 designated is produced to identify the specific portions of the testimony as to which protection is
6 sought and to specify the level of protection being asserted. Only those portions of the testimony
7 that are appropriately designated for protection within the twenty (20) days shall be covered by the
8 provisions of this Protective Order.

9 Transcript pages containing Protected Material must be separately bound by the court
10 reporter, who must affix to the top of each such page the legend “Confidential” or “Highly
11 Confidential – Attorneys’ Eyes Only,” as instructed by the Designating Party.

12 (c) For information produced in some form other than documentary, and for any
13 other tangible items, the Producing Party shall affix the designation “Confidential” or “Highly
14 Confidential – Attorneys’ Eyes Only” in a prominent place on the exterior of the container or
15 containers in which such information or item is stored. If only portions of the information or item
16 warrant protection, the Producing Party, to the extent practicable, shall identify the protected
17 portions, specifying whether they qualify as “Confidential” or as “Highly Confidential – Attorneys’
18 Eyes Only.”

19 5.3 Inadvertent Disclosure. In the event that any privileged attorney-client
20 communication or attorney work product documents or things are inadvertently produced for
21 inspection and/or provided, the Designating Party shall identify such documents or things promptly
22 after discovering that the privileged materials were inadvertently produced for inspection and/or
23 provided, and either: (a) copies shall not be provided; or (b) if copies have already been provided,
24 all copies in the Receiving Party’s possession shall be promptly returned (and not relied upon) by
25 the Receiving Party. Nothing in this paragraph shall prevent the Receiving Party from contending
26 that the identified materials are not privileged, that the materials were not inadvertently produced,
27 or that privilege was waived for reasons other than inadvertent production of the material.
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1 **6. CHALLENGING CONFIDENTIALITY DESIGNATIONS**

2 6.1 Timing of Challenges. 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 later significant disruption or delay of the litigation, a Party does not waive
5 its right to challenge a confidentiality designation by electing not to assert a challenge promptly
6 after the original designation is disclosed.

7 6.2 The Challenge Process. A Party that challenges a Designating Party’s confidentiality
8 designation must do so in good faith, and must notify the Designating Party in writing that the
9 challenging party believes that the designated document or information does not qualify for
10 Confidential or “Highly Confidential – Attorneys’ Eyes Only” treatment under applicable law. The
11 parties shall attempt to resolve such challenges informally. In the event such an attempt is
12 unsuccessful, either the Designating Party or the challenging Party may, within thirty (30) days after
13 such written notification, move the Court for an order removing or confirming such designation.
14 The materials shall retain their original designation until such time as the Court rules on the
15 Designating Party’s motion.

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

17 7.1 Basic Principles. A Receiving Party may use Protected Material that is disclosed or
18 produced by another Party or by a non-party in connection with this case only for prosecuting,
19 defending, or attempting to settle this litigation. Nothing in this Order shall be construed to limit or
20 prohibit the use of information that falls under the ambit of this Order at the trial of this case. If a
21 Party anticipates that it may disclose at any hearing or at trial any information designated pursuant
22 to this Order, it shall give two (2) full court days’ notice to the Court and to all other parties of such
23 anticipated disclosure, specifying whether the information to be disclosed is designated as
24 Confidential or Highly Confidential – Attorneys’ Eyes Only, unless it demonstrates specific exigent
25 circumstances that the Court finds sufficient to justify providing shorter notice. This notice may
26 identify the documents by the identification numbers assigned them at document production or by
27 transcript page and line number. When such notice has been given, only those persons authorized
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1 by this Order to receive that class of Protected Material may be present at the hearing, or at that
2 portion of the hearing or trial during which the disclosure of the Protected Material occurs, except
3 as otherwise ordered by the Court upon motion of a Party or the person seeking to be present. The
4 requirement of advance notice shall not apply to a disclosure of Protected Material in rebuttal or in
5 response to another Party's oral argument when the need for such disclosure could not reasonably
6 be anticipated in advance of the hearing or trial, or for good cause shown to the Court. Before
7 disclosing in rebuttal or in argument any information designated as Confidential or Highly
8 Confidential – Attorneys' Eyes Only, Counsel shall, when possible, inform the Court and opposing
9 counsel of his or her intention to do so and of the designation of the information to be disclosed.
10 Counsel shall then request that persons not authorized by this Order to receive that class of
11 Protected Material be excluded from the courtroom during disclosure.

12 Protected Material may be disclosed only to the categories of persons and under the
13 conditions described in this Order. When the litigation has been terminated, a Receiving Party must
14 comply with the provisions of ¶11.

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

17 7.2 Disclosure of "Confidential" Information or Items. Unless otherwise ordered by the
18 Court or permitted in writing by the Designating Party, a Receiving Party may disclose any
19 information or item designated Confidential only to:

20 (a) The named Parties in this action;

21 (b) The Receiving Party's Counsel in this action, as well as employees of said
22 Counsel to whom it is reasonably necessary to disclose the information for this litigation and who
23 have signed the Acknowledgement and Agreement to Be Bound by Protective Order re:
24 Confidentiality (hereinafter, the "Acknowledgement and Agreement") that is attached hereto as
25 Exhibit A;

26 (c) The officers, directors, and employees (including House Counsel) of the
27 Receiving Party to whom disclosure is reasonably necessary for this litigation and who have signed
28 the "Acknowledgement and Agreement" (Exhibit A);

1 (d) Experts (as defined in this Order) of the Receiving Party to whom disclosure
2 is reasonably necessary for this litigation and who have signed the “Acknowledgement and
3 Agreement” (Exhibit A);

4 (e) Investigators of the Receiving Party to whom disclosure is reasonably
5 necessary for this litigation and who have signed the “Acknowledgement and Agreement” (Exhibit
6 A);

7 (f) The Court and its personnel;

8 (g) Court reporters, their staffs, and Professional Vendors to whom disclosure is
9 reasonably necessary for this litigation and who have signed the “Acknowledgement and
10 Agreement” (Exhibit A);

11 (h) Prospective witnesses, including parties, in the action to whom disclosure is
12 reasonably necessary and who have signed the “Acknowledgement and Agreement” (Exhibit A).
13 Pages of transcribed deposition testimony or exhibits to depositions that reveal Protected Material
14 must be separately bound by the court reporter and may not be disclosed to anyone except as
15 permitted under this Order;

16 (i) The author of the document or the original source of the information; and

17 All Acknowledgement and Agreements shall be retained by Counsel, and, upon good cause
18 shown, may be ordered by the Court to be disclosed to the other Parties’ Counsel.

19 At all times during and subsequent to this action, Counsel shall also be responsible for
20 ensuring that said Confidential Information or Items does not leave their respective custody, except
21 for disclosure to qualified persons during this action. Failure to do so shall be grounds for
22 imposition of sanctions at the discretion of the Court, without limitation on any other rights of
23 persons or entities affected.

24 7.3 Disclosure of “Highly Confidential – Attorneys’ Eyes Only” Information or Items.

25 Unless otherwise ordered by the Court or permitted in writing by the Designating Party, a Receiving
26 Party may only disclose information or items designated “Highly Confidential – Attorneys’ Eyes
27 Only” to the following, and shall not disclose any information or item so designated to any Party or
28 management of a corporate Party unless otherwise agreed or ordered:

1 (a) The Receiving Party’s Outside Counsel of record in this action, as well as
2 employees of said Counsel (including the paralegal, clerical, and secretarial staff employed by such
3 Counsel) to whom it is reasonably necessary to disclose the information for this litigation and who
4 have signed the “Acknowledgement and Agreement” (Exhibit A);

5 (b) Experts to whom disclosure is reasonably necessary for this litigation and
6 who have signed the “Acknowledgement and Agreement” (Exhibit A);

7 (c) Investigators to whom disclosure is reasonably necessary for this litigation
8 and who have signed the “Acknowledgement and Agreement” (Exhibit A);

9 (d) The Court and its personnel;

10 (e) Court reporters, their staffs, and Professional Vendors to whom disclosure is
11 reasonably necessary for this litigation and who have signed the “Acknowledgement and
12 Agreement” (Exhibit A);

13 (f) The author of the document or the original source of the information;

14 (g) Named Plaintiff Kevin Faulk after he has signed the “Acknowledgement and
15 Agreement” (Exhibit A); and

16 (h) (1) The person or persons individually identified by the “Highly Confidential
17 – Attorneys’ Eyes Only” Information or Item, if that Information or Item has been designated
18 “Highly Confidential – Attorneys’ Eyes Only” pursuant to ¶2.4(a) on the ground that it constitutes a
19 Confidential Information or Item that individually identifies an individual and discloses material of
20 a personal or private nature; and (2) the person or persons who work or worked directly with an
21 identified customer or supplier identified by the Highly Confidential – Attorneys’ Eyes Only
22 Information or Item, if that Information or Item has been designated “Highly Confidential –
23 Attorneys’ Eyes Only” pursuant to ¶2.4(b) on the ground that it constitutes a Confidential
24 Information or Item that individually identifies any customer or supplier. The part of the “Highly
25 Confidential – Attorneys’ Eyes Only” Information or Item that may be disclosed to a person
26 identified in ¶7.3(h)(1) is only that part of the Information or Item that pertains to such person and
27 not any part of the Information or Item that pertains to other persons. The part of the “Highly
28 Confidential – Attorneys’ Eyes Only” Information or Item that may be disclosed to a person

1 identified in ¶7.3(h)(2) is only that part of the Information or Item that such person has or had
2 routine access to during such person's work directly with such portion of the customer or supplier
3 identified in that part of the Information or Item.

4 **8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN**
5 **OTHER LITIGATION**

6 If a Receiving Party is served with a subpoena or an order issued in other litigation that
7 would compel disclosure of any information or items designated in this action as "Confidential" or
8 "Highly Confidential – Attorneys' Eyes Only," the Receiving Party must so notify the Designating
9 Party in writing (by fax, if possible) immediately and in no event more than three (3) court days
10 after receiving the subpoena or order. Such notification must include a copy of the subpoena or
11 court order.

12 The Receiving Party also must immediately inform in writing the person, entity, or party
13 that caused the subpoena or order to issue in the other litigation that some or all the material
14 covered by the subpoena or order is the subject of this Protective Order. In addition, the Receiving
15 Party must deliver a copy of this Protective Order promptly to the person, entity, or party in the
16 other action that caused the subpoena or order to issue.

17 The purpose of imposing these duties is to alert the interested parties to the existence of this
18 Protective Order and to afford the Designating Party in this case an opportunity to attempt to protect
19 its confidentiality interests in the court from which the subpoena or order issued. The Designating
20 Party shall bear the burdens and the expenses of seeking protection in that court of its confidential
21 material. Nothing in these provisions should be construed as authorizing or encouraging a
22 Receiving Party in this action to disobey a lawful directive from another court.

23 **9. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL**

24 If a Receiving Party learns that it has disclosed Protected Material by inadvertence or
25 otherwise to any person or in any circumstance not authorized by this Order, the Receiving Party
26 shall immediately: a) notify in writing the Designating Party of the unauthorized disclosures; b) use
27 its best efforts to retrieve all copies of the Protected Material; c) inform the person or persons to
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1 whom unauthorized disclosures were made of all the terms of this Order; and d) request such person
2 or persons to execute the “Acknowledgement and Agreement” (Exhibit A).

3 **10. FILING PROTECTED MATERIAL**

4 Without written permission from the Designating Party or a court order secured after
5 appropriate notice to all interested persons, a Party may not file in the public record in this action
6 any Protected Material. A Party that seeks to file under seal any Protected Material must comply
7 with Civil Local Rule 79-5 and General Order 62.

8 **11. FINAL DISPOSITION**

9
10 Unless otherwise ordered or agreed in writing by the Producing Party, within sixty (60) days
11 after notice of the final termination of this action, each Receiving Party must destroy all Protected
12 Material or otherwise dispose of such material as the Court requires. As used in this subdivision,
13 “all Protected Material” includes all copies, abstracts, compilations, summaries or any other form of
14 reproducing or capturing any of the Protected Material. The Receiving Party must submit a written
15 statement to the Producing Party (and, if not the same person or entity, to the Designating Party) by
16 the 60-day deadline that identifies (by category, where appropriate) the Protected Material that was
17 destroyed and that affirms that the Receiving Party has not retained any copies, abstracts,
18 compilations, summaries or other forms of reproducing or capturing any of the Protected Material.
19 Notwithstanding this provision, Counsel are entitled to retain an archival copy of all pleadings,
20 motion papers, transcripts, legal memoranda, correspondence or attorney work product, even if such
21 materials contain Protected Material. Any such archival copies that contain or constitute Protected
22 Material remain subject to this Order as set forth in ¶4, above.

23 After termination of this action, the Court shall retain jurisdiction to issue any further orders
24 that may be required to preserve the confidentiality of any Confidential Information.

25 **12. MISCELLANEOUS**

26
27 12.1 Right to Further Relief. Nothing in this Order abridges the right of any person to
28 seek its modification by the Court in the future. If any Party seeks to modify any term of this Order

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Dated: February 13, 2012

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Attorneys for Plaintiff
KEVIN FAULK

ORDER

Pursuant to Stipulation, **IT IS SO ORDERED.**

Dated: 2/14/12



United States District Judge

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EXHIBIT A

**ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND
BY PROTECTIVE ORDER RE: CONFIDENTIALITY**

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 Re: Confidentiality (the "Protective Order") that was entered by the United States District Court for the Northern District of California on [Date] _____, 2012, in the case of *Kevin Faulk v. Sears, Roebuck and Co.*, Case No. 3:11-CV-02159-SI. I agree to comply with and to be bound by all the terms of this Protective Order. I understand and acknowledge that failure to comply could expose me to sanctions and punishment in the nature of contempt of court. I promise that I will not disclose in any manner any information or item that is subject to this Protective Order to any person or entity except in strict compliance with the provisions of this Protective 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 Protective Order, even if such enforcement proceedings occur after termination of this action.

Date: _____

City and State where sworn and signed: _____

Printed Name: _____

Signature: _____