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8 Attorneys for Plaintiff  
NADA PACIFIC CORPORATION

9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA

12 NADA PACIFIC CORPORATION, a  
California corporation,

13 Plaintiff,

14 v.

15 POWER ENGINEERING AND  
16 MANUFACTURING, LTD., an Iowa  
corporation,

17 Defendant.

Case No. 3:12-cv-05133-SC

**STIPULATION AND PROTECTIVE  
ORDER**

18  
19 AND RELATED CROSS-ACTION.

20  
21 The parties to this Stipulation and Protective Order are Plaintiff NADA PACIFIC  
22 CORPORATION ("NADA"), Defendant and Third-Party Plaintiff POWER ENGINEERING  
23 AND MANUFACTURING, LTD. ("PEM"), Third-Party Defendant BESSER COMPANY  
24 ("BESSER"), and Third-Party Defendant and Cross-Claimant AKKERMAN INC.  
25 ("AKKERMAN"). The parties stipulate that the Court shall enter a protective order under  
26 Federal Rules of Civil Procedure 26(c) and 34.

27 1. Proceedings and Information Governed. This Stipulation will govern any and all  
28 confidential document(s), information, or other thing furnished by any party to any other party in

1 connection with the exchange of documents and materials. The information deemed to be  
2 confidential and protected for purposes of this Stipulation includes, but is not limited to, Bid  
3 Estimates, Bid Documents, and Job Cost Logs pertaining to the public works improvement  
4 project at issue in the above-captioned litigation known as the San Francisco Public Utilities  
5 Commission-Alameda Siphon Project No. 4 (hereinafter "Project") and the microtunnel boring  
6 machine used on the Project, including the components which were a part thereof.

7 2. Confidential Information Defined. For the purposes of this Stipulation,  
8 "confidential information" will mean all information or material that:

9 (a) The party producing the information and/or document(s) reasonably  
10 believes to constitute or contain trade secrets or other confidential information, whether embodied  
11 in physical objects, documents, or the factual knowledge of persons; and

12 (b) Has been designated as confidential information by the party in compliance  
13 with this Stipulation.

14 The restrictions of this Stipulation will not apply to any information that:

15 (a) At the time of the disclosure to a qualified recipient (as defined in  
16 paragraph 5) is in the public domain;

17 (b) After disclosure to a qualified recipient becomes part of the public domain  
18 as a result of publication not involving a violation of this Stipulation;

19 (c) A qualified recipient can show was in its possession at the time of the  
20 disclosure;

21 (d) A qualified recipient can show was received by it from a source who  
22 obtained the information lawfully and under no obligation of confidentiality to the producing  
23 party; or

24 (e) A qualified recipient can show was independently developed by it after  
25 disclosure.

26 3. Designation of Confidential Information. The parties will designate confidential  
27 information by stamping or affixing to the physical objects or documents a legend that includes  
28 the following language:

1 NPC CONFIDENTIAL  
2 SUBJECT TO PROTECTIVE ORDER

3 PEM CONFIDENTIAL  
4 SUBJECT TO PROTECTIVE ORDER

5 BESSER CONFIDENTIAL  
6 SUBJECT TO PROTECTIVE ORDER

7 AKKERMAN CONFIDENTIAL  
8 SUBJECT TO PROTECTIVE ORDER

9 4. Party's Own Information. The restrictions on the use of confidential information  
10 established by this Stipulation apply only to the use by a party of confidential information  
11 received from the parties.

12 5. Persons Authorized to Receive Confidential Information. For the purpose of this  
13 Stipulation, "qualified recipient" will mean:

14 (a) The attorneys of record in this action; any attorneys retained by the parties  
15 in this action to consult on the litigation; their respective associates, clerks, legal assistants, and  
16 stenographic and support personnel; and organizations, and their employees, retained by such  
17 attorneys to provide litigation support services in this action;

18 (b) Any independent consultant or other person who is designated by written  
19 agreement of all parties in this action or by order of the Court, obtained on noticed motion (or on  
20 shortened time as allowed by the Court) permitting such disclosure, or who may otherwise obtain  
21 authorization to receive confidential information in accordance with this Stipulation;

22 (c) The officers, directors and employees of a party;

23 (d) Mediators and Arbitrators agreed upon by the parties or appointed by a  
24 Court;

25 (e) The persons who are authors or addressees of the confidential information;  
26 and

27 (f) Other persons to whom the parties agree or the Court orders that  
28 disclosures will be made.

6. Documents Produced By the Parties. At the request of the Parties, all documents  
and physical objects produced as a result of this Stipulation, as identified in paragraph 1, and

1 marked as confidential will initially be considered to constitute confidential information. The  
2 Parties may designate any documents, testimony or information as containing Confidential  
3 Information which it has previously produced or exchanged without such designation or that has  
4 been produced by the parties and was not designated as containing Confidential Information at  
5 the time produced. Notice of such post-production designation shall be given in writing to all  
6 parties to whom such materials have previously been furnished within thirty (30) calendar days  
7 after the document or information has been produced. From the time such post-production  
8 designation is made, it shall have the same effect as if each individual item designated on a post-  
9 production basis was, in fact, marked as set forth above.

10 7. Removal. A party may seek removal of particular items of confidential  
11 information from this Stipulation by giving counsel for the other party written notice of its intent  
12 to seek removal, supported by reasons for the removal, specifying the items of confidential  
13 information for which removal is sought. The request will become effective unless, within ten  
14 (10) days after actual receipt of the request, the party serves a written objection to the removal,  
15 stating the reasons for the objection to the removal. The parties will confer to attempt to resolve  
16 the objection, but if the parties cannot resolve the objection within five (5) business days after  
17 actual receipt of the written objection, the receiving party will have an additional five business  
18 days to file and serve the other parties with a motion for removal from the protective order from  
19 the Court. At a hearing on the motion for removal, the receiving party will have the burden of  
20 proving that the information is subject to an exception stated in paragraph 2, or not confidential as  
21 that term is defined in paragraph 2.

22 8. Use of Confidential Information. Any confidential information will be handled by  
23 the receiving party in accordance with the terms of this Stipulation. Confidential information will  
24 be held in confidence by each receiving party, will be used by each receiving party for purposes  
25 of this action (or arbitration) only and not for any business or other purpose unless agreed to in  
26 writing by all parties to this action (or arbitration) or as authorized by further order of the Court,  
27 and will not be disclosed to any person who is not a qualified recipient, except as provided in this  
28 Stipulation. All confidential information will be maintained to preclude access by persons who

1 are not qualified recipients. Any violation of this protective order by a receiving party will  
2 subject the violating party to contempt proceedings, and the party claiming a violation of this  
3 agreement shall be entitled to seek monetary or other sanctions against the violating party. In the  
4 event that any party to this Stipulation pursues contempt proceedings, or seeks sanctions or  
5 enforcement of the terms of this protective, whether in the context of judicial or arbitration  
6 proceedings, that party shall be entitled to recover reasonable attorneys' fees, but only if that  
7 party prevails in such proceedings.

8 9. Copies of Confidential Information. Confidential information will not be copied  
9 or otherwise reproduced by a receiving party, except for transmission to qualified recipients as  
10 specified in paragraph 10, without the written permission of the producing party or by further  
11 order of the Court/Arbitrator(s). Counsel receiving Confidential Documents shall maintain a list  
12 showing the name of each person to whom access to Confidential Documents is given by said  
13 counsel along with the date thereof.

14 10. Transmission of Information. Nothing in this Stipulation will prohibit the  
15 transmission or communication of confidential information between or among qualified  
16 recipients:

- 17 (a) By hand delivery;
- 18 (b) by face-to-face conference;
- 19 (c) In sealed envelopes or containers via the mails or an established freight,  
20 delivery, or messenger service; or
- 21 (d) By telephone, telegram, facsimile, or other electronic transmission system  
22 if, under the circumstances, there is no reasonable likelihood that the transmission will be  
23 intercepted or misused by any person who is not a qualified recipient.

24 11. Disclosure to Experts, Consultants, and Other Persons. In the preparation for trial,  
25 mediation, arbitration or analysis of claims and/or disputes relating to the Project, if a qualified  
26 recipient finds it necessary to disclose a producing party's confidential information to an  
27 independent technical or business expert, consultant, or any other person retained by the qualified  
28 recipient or its attorneys to assist in this action, the qualified recipient may do so. However, any

1 such expert, consultant or other person receiving confidential information shall be bound by the  
2 terms of this Agreement and shall agree, in writing, as an express condition precedent to the  
3 disclosure of said confidential information, to maintain the confidentiality of the disclosure.

4 12. Affidavits. Each person to whom confidential information will be given, shown,  
5 disclosed, made available, or communicated in any way, except clerical and stenographic  
6 personnel described in paragraph 5, will first execute an affidavit, in the form of Attachment A to  
7 this Stipulation, agreeing to be bound by the terms of this Stipulation. A copy of the affidavit will  
8 be served on all parties.

9 13. Court Procedures. In the event that any Confidential Information is included with,  
10 or the contents thereof are in any way disclosed in, any pleading, brief, deposition transcript, or  
11 other paper filed with the Clerk of this Court, the portions of such papers containing Confidential  
12 Information shall be filed with a motion asking that such pleading, brief, deposition transcript, or  
13 other paper be sealed in the Court file with the following legend: "CONFIDENTIAL: This  
14 envelope is sealed under order of the Court, contains confidential information, and may not be  
15 opened nor the contents revealed except by order of the Court." Any court or arbitration hearing  
16 that refers to or describes confidential information, documents and materials will be held in  
17 camera in the Court's discretion. The manner of presentation and use of confidential information,  
18 documents or materials at trial (or arbitration or mediation) will be addressed in the pretrial  
19 conference or pre-arbitration order. The Parties agree that the Court, in preparing, evaluating or  
20 issuing any pretrial order, pre-arbitration order, or any other order regarding the admissibility of  
21 evidence or testimony, which evidence or testimony contains, references or otherwise related to  
22 information, documents or materials designated by the parties as confidential in accordance with  
23 the terms of this Stipulation, may and should strongly consider the terms of this Stipulation  
24 during the preparation, evaluation or issuance of any such order.

25 14. Testimony. Any person may be interviewed and examined as a witness at  
26 depositions and may testify concerning all confidential information of which the person has prior  
27 knowledge. If an interview or examination concerns confidential information, the producing  
28 party will have the right to exclude from the portion of the examination or interview concerning

1 the confidential information any person other than the witness, the witness's attorney(s), and  
2 qualified recipients of the confidential information. If the witness is represented by an attorney  
3 who is not a qualified recipient, then before the interview or examination, either the producing  
4 party will be given the opportunity to seek a further protective order or the attorney will be  
5 requested to provide an affidavit, in the form of Attachment A to this Stipulation, that he or she  
6 will comply with the terms of this Stipulation and maintain the confidentiality of confidential  
7 information disclosed during the course of the interview or examination. If the attorney declines  
8 to give the affidavit, the parties' attorneys, before the interview or examination, will jointly seek a  
9 further protective order from the Court/Arbitrator(s) prohibiting the attorney from disclosing the  
10 confidential information.

11 15. Depositions. Any deposition reporter who takes down testimony in this action will  
12 be given a copy of this Stipulation and will be required to agree on the transcript of the  
13 deposition, before taking down any testimony, that he or she will not disclose any testimony and  
14 information revealed at the deposition, except to the attorneys of record for the parties in this  
15 action.

16 At the written request of a party, the original and all copies of any deposition transcript  
17 will be initially considered as a whole to constitute confidential information subject to this  
18 Stipulation. On written demand by a non-requesting party, accompanied by a written designation  
19 of the portions of testimony in the transcript that the non-requesting party considers to constitute  
20 non-confidential information, the requesting party will have ten (10) days after actual receipt of  
21 the demand to designate in writing those portions of the testimony in the transcript that the  
22 requesting party considers to constitute confidential information. Any disputes over this  
23 designation will be resolved through the procedure designated in paragraph 7 for removal of  
24 information from designation as confidential information. Once resolved, the reporter will  
25 promptly conform the original copy, and counsel will conform their copies, of the transcript in  
26 accordance with the agreed-on or resolved designation. The portions designated as confidential  
27 information will thereafter be separated and treated as confidential information subject to this  
28 Stipulation.

1           16.     Subpoenas. If any person or party having possession, custody, or control of any  
2 confidential information receives a subpoena or other process or order to produce confidential  
3 information, he or she will promptly:

4                   (a)     Notify in writing the attorneys of record for the party claiming  
5 confidentiality of the confidential information sought by the subpoena or other process or order;

6                   (b)     Furnish those attorneys with a copy of the subpoena or other process or  
7 order; and

8                   (c)     Provide reasonable cooperation with respect to any procedure to protect the  
9 confidential information sought to be pursued by the party whose interests may be affected.

10           If a party makes a motion to quash or modify the subpoena, process, or order, there will be  
11 no disclosure of the subject matter objected to under the subpoena, process, or order until the  
12 Court has ruled on the motion, and then only in accordance with the ruling. If no motion is made  
13 despite a reasonable opportunity to do so, the person or party receiving the subpoena or other  
14 process or order will be entitled to comply with it if the person or party has fulfilled its  
15 obligations under this Stipulation.

16           17.     Attorneys' Actions. Nothing in this Stipulation will bar or otherwise restrict an  
17 attorney who is a qualified recipient from:

18                   (a)     Rendering advice to his or her client with respect to this action; or

19                   (b)     Generally referring to or relying on his or her examination of documents  
20 that have been produced under this Stipulation and that contain confidential information.

21           In rendering such advice or in otherwise communicating with his or her client, the  
22 attorney will not disclose the specific content of any document produced by NADA or any other  
23 party, or the confidential information contained in any document produced, if disclosure would  
24 not otherwise be permitted under the terms of this Stipulation.

25           18.     No Waiver. The taking of, or the failure to take, any action to enforce the  
26 provisions of this Stipulation, or the failure to object to any designation or any such action or  
27 omission, will not constitute a waiver of any right to seek and obtain protection or relief, other  
28 than as specified in this Stipulation, of any claim or defense in this action or any other action,

1 including but not limited to, any claim or defense that any information:

- 2 (a) Is or is not relevant, material, or otherwise discoverable;
- 3 (b) Is or is not confidential or proprietary to any party;
- 4 (c) Is or is not entitled to particular protection; or
- 5 (d) Embodies or does not embody confidential commercial information of any
- 6 party.

7 In making this claim or defense, the party must comply with the procedures described in  
8 this Stipulation. This Stipulation is entered without prejudice to the right of any party to apply to  
9 the Court at any time to relax or rescind the restrictions of this Stipulation, when convenience or  
10 necessity requires. The procedures set forth in this Stipulation will not affect the rights of the  
11 parties to object to discovery on grounds other than those related to confidential or proprietary  
12 information claims, nor will they relieve a party of the necessity of proper response to discovery  
13 devices.

14 19. No Probative Value. This Stipulation will not abrogate or diminish any  
15 contractual, statutory, or other legal obligation or right of any party or person with respect to any  
16 confidential information. The fact that information is designated as confidential information  
17 under this Stipulation will not be considered to be determinative of what a trier of fact may  
18 determine to be confidential or proprietary.

19 Absent a Stipulation of all parties, the fact that information has been designated as  
20 confidential information under this Stipulation will not be admissible during the trial or  
21 arbitration of this matter, nor will the jury be advised of this designation. The fact that any  
22 information is disclosed, used, or produced in discovery or at trial in this action will not be  
23 construed to be admissible or offered in any action or proceeding before any court, agency, or  
24 arbitration tribunal as evidence that the information:

- 25 (a) Is or is not relevant, material, or otherwise admissible;
- 26 (b) Is or is not confidential or proprietary to any party;
- 27 (c) Is or is not entitled to particular protection; or
- 28 (d) Embodies or does not embody confidential commercial information of any

1 party.

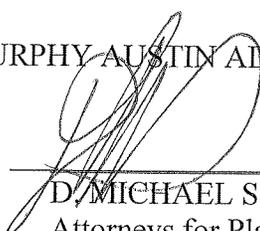
2 20. Return of Information. Within ten (10) days after entry of final judgment in or the  
3 filing of dismissals with prejudice concluding this litigation (including appeals), counsel shall  
4 return all Confidential Documents produced in accordance herewith and shall destroy all notes,  
5 synopsis, summaries or digests of Confidential Documents and information therein. Notice of  
6 destruction as aforesaid shall be given by counsel to all other counsel. All confidential  
7 information not embodied in written materials, documents, or tangible items will remain subject  
8 to this Stipulation. In no event will a party retain a copy of any confidential information  
9 produced to it.

10 21. Court's Jurisdiction. The court/arbitrator(s) retains jurisdiction to make  
11 amendments, modifications, deletions, and additions to this Stipulation as the Court from time to  
12 time considers appropriate. The provisions of this Stipulation regarding the use or disclosure of  
13 information designated as confidential information will survive the termination of this action, and  
14 the Court will retain jurisdiction with respect to this Stipulation.

15 22. Notices. Any of the notice requirements in this Stipulation may be waived, in  
16 whole or in part, but only a writing signed by the attorney of record for the party against whom  
17 such waiver is sought will be effective.

18 Dated: 6/27/, 2013

MURPHY AUSTIN ADAMS SCHOENFELD LLP

19  
20 By:   
21 D. MICHAEL SCHOENFELD  
22 Attorneys for Plaintiff NADA PACIFIC  
23 CORPORATION

24 Dated: June 25, 2013

GUICHARD TENG & PORTELLO, A.P.C.

25 By:   
26 MATTHEW P. GUICHARD  
27 WILLIAM L. PORTELLO  
28 CHRISTOPHER K. TENG  
Attorneys for Defendant and Third-Party  
Plaintiff POWER ENGINEERING AND  
MANUFACTURING, LTD.

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Dated: June 21, 2013

BAKER & HOSTETLER LLP

By:   
CORY M. CURTIS  
Attorneys for Third Party Defendant  
BESSER COMPANY

Dated: \_\_\_\_\_, 2013

HOVERSTEN, JOHNSON, BECKMAN &  
HOVEY, LLP

By: \_\_\_\_\_  
CAMERON D. DAVIS  
Attorneys for Third Party Defendant and  
Cross-Claimant AKKERMAN INC.

**IT IS SO ORDERED:**

Date: \_\_\_\_\_, 2013

\_\_\_\_\_  
JUDGE OF THE DISTRICT COURT

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Dated: \_\_\_\_\_, 2013

BAKER & HOSTETLER LLP

By: \_\_\_\_\_

CORY M. CURTIS  
Attorneys for Third Party Defendant  
BESSER COMPANY

Dated: 6-21, 2013

HOVERSTEN, JOHNSON, BECKMAN &  
HOVEY, LLP

By:  \_\_\_\_\_

CAMERON D. DAVIS  
Attorneys for Third Party Defendant and  
Cross-Claimant AKKERMAN INC.

**IT IS SO ORDERED:**

Date: 09/11, 2013

