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

12
 13 Daniel J. Kane and Mesa Photonics, LLC,
 14 Plaintiffs,
 15 v.
 16 Kenneth W. Delong, Femtosoft Technologies,
 and DOES 1-10,
 17 Defendants.

Case No. 3:12-cv-05437-EMC

**STIPULATED PROTECTIVE ORDER
 FOR LITIGATION INVOLVING
 PATENTS, HIGHLY SENSITIVE
 CONFIDENTIAL INFORMATION
 AND/OR TRADE SECRETS**

Judge: Edward M. Chen

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 19 KENNETH W. DELONG, FEMTOSOFT
 20 TECHNOLOGIES,
 21 Counterclaimants,
 22 v.
 23 DANIEL J. KANE and MESA PHOTONICS,
 24 LLC,
 25 Counterclaim Defendants.
 26

1 1. PURPOSES AND LIMITATIONS

2 Disclosure and discovery activity in this action are likely to involve production of
3 confidential, proprietary, or private information for which special protection from public
4 disclosure and from use for any purpose other than prosecuting this litigation may be warranted.
5 Accordingly, the parties hereby stipulate to and petition the court to enter the following Stipulated
6 Protective Order. The parties acknowledge that this Order does not confer blanket protections on
7 all disclosures or responses to discovery and that the protection it affords from public disclosure
8 and use extends only to the limited information or items that are entitled to confidential treatment
9 under the applicable legal principles. The parties further acknowledge, as set forth in Section
10 14.4, below, that this Stipulated Protective Order does not entitle them to file confidential
11 information under seal; Civil Local Rule 79-5 and General Order 62 set forth the procedures that
12 must be followed and the standards that will be applied when a party seeks permission from the
13 court to file material under seal.

14 2. DEFINITIONS

15 2.1 Challenging Party: a Party or Non-Party that challenges the designation of information
16 or items under this Order.

17 2.2 “CONFIDENTIAL” Information or Items: information (regardless of how it is
18 generated, stored or maintained) or tangible things that qualify for protection under Federal Rule
19 of Civil Procedure 26(c).

20 2.3 Counsel (without qualifier): Outside Counsel of Record in this action (as well as their
21 support staff).

22 2.4 Designating Party: a Party or Non-Party that designates information or items that it
23 produces in disclosures or in responses to discovery as “CONFIDENTIAL” or “HIGHLY
24 CONFIDENTIAL – ATTORNEYS’ EYES ONLY”

25 2.5 Disclosure or Discovery Material: all items or information, regardless of the medium
26 or manner in which it is generated, stored, or maintained (including, among other things,
27 testimony, transcripts, and tangible things), that are produced or generated in disclosures or
28 responses to discovery in this matter.

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

6 2.7 "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" Information or Items:
7 extremely sensitive "Confidential Information or Items," disclosure of which to another Party or
8 Non-Party would create a substantial risk of serious harm that could not be avoided by less
9 restrictive means.

10 2.9 Non-Party: any natural person, partnership, corporation, association, or other legal
11 entity not named as a Party to this action.

12 2.10 Outside Counsel of Record: attorneys who are not employees of a party to this action
13 but are retained to represent or advise a party to this action and have appeared in this action on
14 behalf of that party or are affiliated with a law firm which has appeared on behalf of that party.

15 2.11 Party: any party to this action, including all of its officers, directors, employees,
16 consultants, retained experts, and Outside Counsel of Record (and their support staffs).

17 2.12 Producing Party: a Party or Non-Party that produces Disclosure or Discovery
18 Material in this action.

19 2.13 Professional Vendors: persons or entities that provide litigation support services (e.g.,
20 photocopying, videotaping, translating, preparing exhibits or demonstrations, and organizing,
21 storing, or retrieving data in any form or medium) and their employees and subcontractors.

22 2.14 Protected Material: any Disclosure or Discovery Material that is designated as
23 "CONFIDENTIAL," or as "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY."

24 2.15 Receiving Party: a Party that receives Disclosure or Discovery Material from a
25 Producing Party.

26 3. SCOPE

27 The protections conferred by this Stipulation and Order cover not only Protected Material
28 (as defined above), but also (1) any information copied or extracted from Protected Material; (2)

1 all copies, excerpts, summaries, or compilations of Protected Material; and (3) any testimony,
2 conversations, or presentations by Parties or their Counsel that might reveal Protected Material.
3 However, the protections conferred by this Stipulation and Order do not cover the following
4 information: (a) any information that is in the public domain at the time of disclosure to a
5 Receiving Party or becomes part of the public domain after its disclosure to a Receiving Party as
6 a result of publication not involving a violation of this Order, including becoming part of the
7 public record through trial or otherwise; and (b) any information known to the Receiving Party
8 prior to the disclosure or obtained by the Receiving Party after the disclosure from a source who
9 obtained the information lawfully and under no obligation of confidentiality to the Designating
10 Party. Any use of Protected Material at trial shall be governed by a separate agreement or order.

11 4. DURATION

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

19 5. DESIGNATING PROTECTED MATERIAL

20 5.1 Exercise of Restraint and Care in Designating Material for Protection. Each Party or
21 Non- Party that designates information or items for protection under this Order must take care to
22 limit any such designation to specific material that qualifies under the appropriate standards. To
23 the extent it is practical to do so, the Designating Party must designate for protection only those
24 parts of material, documents, items, or oral or written communications that qualify – so that other
25 portions of the material, documents, items, or communications for which protection is not
26 warranted are not swept unjustifiably within the ambit of this Order. Mass, indiscriminate, or
27 routinized designations are prohibited. Designations that are shown to be clearly unjustified or
28 that have been made for an improper purpose (e.g., to unnecessarily encumber or retard the case

1 development process or to impose unnecessary expenses and burdens on other parties) expose the
2 Designating Party to sanctions. If it comes to a Designating Party's attention that information or
3 items that it designated for protection do not qualify for protection at all or do not qualify for the
4 level of protection initially asserted, that Designating Party must promptly notify all other parties
5 that it is withdrawing the mistaken designation.

6 5.2 Manner and Timing of Designations. Except as otherwise provided in this Order (see,
7 e.g., second paragraph of section 5.2(a) below), or as otherwise stipulated or ordered, Disclosure
8 or Discovery Material that qualifies for protection under this Order must be clearly so designated
9 before the material is disclosed or produced. Designation in conformity with this Order requires:

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

1 (b) for testimony given in deposition or in other pretrial or trial proceedings, that the
2 Designating Party identify on the record, before the close of the deposition, hearing, or other
3 proceeding, all protected testimony and specify the level of protection being asserted. When it is
4 impractical to identify separately each portion of testimony that is entitled to protection and it
5 appears that substantial portions of the testimony may qualify for protection, the Designating
6 Party may invoke on the record (before the deposition, hearing, or other proceeding is concluded)
7 a right to have up to 21 days to identify the specific portions of the testimony as to which
8 protection is sought and to specify the level of protection being asserted. Only those portions of
9 the testimony that are appropriately designated for protection within the 21 days shall be covered
10 by the provisions of this Stipulated Protective Order. Alternatively, a Designating Party may
11 specify, at the deposition or up to 21 days afterwards if that period is properly invoked, that the
12 entire transcript shall be treated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL –
13 ATTORNEYS’ EYES ONLY.” Parties shall give the other parties notice if they reasonably
14 expect a deposition, hearing or other proceeding to include Protected Material so that the other
15 parties can ensure that only authorized individuals who have signed the “Acknowledgment and
16 Agreement to Be Bound” (Exhibit A) are present at those proceedings. The use of a document as
17 an exhibit at a deposition shall not in any way affect its designation as “CONFIDENTIAL” or
18 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.” Transcripts containing Protected
19 Material shall have an obvious legend on the title page that the transcript contains Protected
20 Material, and the title page shall be followed by a list of all pages (including line numbers as
21 appropriate) that have been designated as Protected Material and the level of protection being
22 asserted by the Designating Party. The Designating Party shall inform the court reporter of these
23 requirements. Any transcript that is prepared before the expiration of a 21-day period for
24 designation shall be treated during that period as if it had been designated “HIGHLY
25 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” in its entirety unless otherwise agreed. After
26 the expiration of that period, the transcript shall be treated only as actually designated.

27 (c) for information produced in some form other than documentary and for any other
28 tangible items, that the Producing Party affix in a prominent place on the exterior of the container

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

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

10 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

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

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

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

2 6.3 Judicial Intervention. If the Parties cannot resolve a challenge without court
3 intervention, the Designating Party shall file and serve a motion to retain confidentiality under
4 Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5 and General Order 62, if
5 applicable) within 21 days of the initial notice of challenge or within 14 days of the parties
6 agreeing that the meet and confer process will not resolve their dispute, whichever is earlier. Each
7 such motion must be accompanied by a competent declaration affirming that the movant has
8 complied with the meet and confer requirements imposed in the preceding paragraph. Failure by
9 the Designating Party to make such a motion including the required declaration within 21 days (or
10 14 days, if applicable) shall automatically waive the confidentiality designation for each
11 challenged designation. In addition, the Challenging Party may file a motion challenging a
12 confidentiality designation at any time if there is good cause for doing so, including a challenge to
13 the designation of a deposition transcript or any portions thereof. Any motion brought pursuant to
14 this provision must be accompanied by a competent declaration affirming that the movant has
15 complied with the meet and confer requirements imposed by the preceding paragraph. The burden
16 of persuasion in any such challenge proceeding shall be on the Designating Party. Frivolous
17 challenges and those made for an improper purpose (e.g., to harass or impose unnecessary
18 expenses and burdens on other parties) may expose the Challenging Party to sanctions. Unless the
19 Designating Party has waived the confidentiality designation by failing to file a motion to retain
20 confidentiality as described above, all parties shall continue to afford the material in question the
21 level of protection to which it is entitled under the Producing Party's designation until the court
22 rules on the challenge.

23 7. ACCESS TO AND USE OF PROTECTED MATERIAL

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

1 DISPOSITION). Protected Material must be stored and maintained by a Receiving Party at a
2 location and in a secure manner¹ that ensures that access is limited to the persons authorized
3 under this Order.

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

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

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

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

17 (d) the court and its personnel;

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

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

27 _____
28 ¹ It may be appropriate under certain circumstances to require the Receiving Party to store any
electronic Protected Material in password-protected form.

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

3 7.3 Disclosure of “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”
4 Information or Items. Unless otherwise ordered by the court or permitted in writing by the
5 Designating Party, a Receiving Party may disclose any information or item designated “HIGHLY
6 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” only to:

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

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

14 (c) the court and its personnel;

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

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

20 7.4 Procedures for Approving or Objecting to Disclosure of “HIGHLY CONFIDENTIAL
21 - ATTORNEYS’ EYES ONLY” Information or Items to Experts.

22 (a)(1) Unless otherwise ordered by the court or agreed to in writing by the Designating
23 Party, a Party that seeks to disclose to an Expert (as defined in this Order) any information or item
24 that has been designated “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” pursuant
25 to paragraph 7.3(b) first must make a written request to the Designating Party that (1) identifies
26 the general categories of “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”
27 information that the Receiving Party seeks permission to disclose to the Expert, (2) sets forth the
28 full name of the Expert and the city and state of his or her primary residence, (3) attaches a copy

1 of the Expert's current resume, (4) identifies the Expert's current employer(s), (5) identifies each
2 person or entity from whom the Expert has received compensation or funding for work in his or
3 her areas of expertise or to whom the expert has provided professional services, including in
4 connection with a litigation, at any time during the preceding five years,² and (6) identifies (by
5 name and number of the case, filing date, and location of court) any litigation in connection with
6 which the Expert has offered expert testimony, including through a declaration, report, or
7 testimony at a deposition or trial, during the preceding five years.³

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

12 (c) A Party that receives a timely written objection must meet and confer with the
13 Designating Party (through direct voice to voice dialogue) to try to resolve the matter by
14 agreement within seven days of the written objection. If no agreement is reached, the Party
15 seeking to make the disclosure to the Expert may file a motion as provided in Civil Local Rule 7
16 (and in compliance with Civil Local Rule 79-5 and General Order 62, if applicable) seeking
17 permission from the court to do so. Any such motion must describe the circumstances with
18 specificity, set forth in detail the reasons why the disclosure to the Expert is reasonably necessary,
19 assess the risk of harm that the disclosure would entail, and suggest any additional means that
20 could be used to reduce that risk. In addition, any such motion must be accompanied by a
21 competent declaration describing the parties' efforts to resolve the matter by agreement (i.e., the
22 extent and the content of the meet and confer discussions) and setting forth the reasons advanced
23 by the Designating Party for its refusal to approve the disclosure. In any such proceeding, the

24 ² If the Expert believes any of this information is subject to a confidentiality obligation to a third-
25 party, then the Expert should provide whatever information the Expert believes can be disclosed
26 without violating any confidentiality agreements, and the Party seeking to disclose to the Expert
27 shall be available to meet and confer with the Designating Party regarding any such engagement.

28 ³ It may be appropriate in certain circumstances to restrict the Expert from undertaking certain
limited work prior to the termination of the litigation that could foreseeably result in an improper
use of the Designating Party's "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY"
information.

1 Party opposing disclosure to the Expert shall bear the burden of proving that the risk of harm that
2 the disclosure would entail (under the safeguards proposed) outweighs the Receiving Party's need
3 to disclose the Protected Material to its Expert.

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

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

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

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

14 (c) cooperate with respect to all reasonable procedures sought to be pursued by the Designating
15 Party whose Protected Material may be affected.⁴ If the Designating Party timely seeks a
16 protective order, the Party served with the subpoena or court order shall not produce any
17 information designated in this action as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL –
18 ATTORNEYS' EYES ONLY" before a determination by the court from which the subpoena or
19 order issued, unless the Party has obtained the Designating Party's permission. The Designating
20 Party shall bear the burden and expense of seeking protection in that court of its confidential
21 material – and 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. A NON-PARTY'S PROTECTED MATERIAL SOUGHT TO BE PRODUCED IN THIS 24 LITIGATION

25 (a) The terms of this Order are applicable to information produced by a Non-Party in this
26 action and designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS'

27 ⁴ The purpose of imposing these duties is to alert the interested parties to the existence of this
28 Protective Order and to 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.

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1 EYES ONLY.” Such information produced by Non-Parties in connection with this litigation is
2 protected by the remedies and relief provided by this Order. Nothing in these provisions should
3 be construed as prohibiting a Non-Party from seeking additional protections. (b) In the event that
4 a Party is required, by a valid discovery request, to produce a Non- Party’s confidential
5 information in its possession, and the Party is subject to an agreement with the Non- Party not to
6 produce the Non-Party’s confidential information, then the Party shall:

- 7 1. promptly notify in writing the Requesting Party and the Non-Party that some or all of
8 the information requested is subject to a confidentiality agreement with a Non-Party;
- 9 2. promptly provide the Non-Party with a copy of the Stipulated Protective Order in this
10 litigation, the relevant discovery request(s), and a reasonably specific description of the
11 information requested; and
- 12 3. make the information requested available for inspection by the Non-Party.

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

20 10. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

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

27 ⁵ The purpose of this provision is to alert the interested parties to the existence of confidentiality
28 rights of a Non-Party and to afford the Non-Party an opportunity to protect its confidentiality
interests in this court.

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1 “Acknowledgment and Agreement to Be Bound” that is attached hereto as Exhibit A.

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

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

13 12. MISCELLANEOUS

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

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

21 12.3 Filing Protected Material. Without written permission from the Designating Party or
22 a court order secured after appropriate notice to all interested persons, a Party may not file in the
23 public record in this action any Protected Material. A Party that seeks to file under seal any
24 Protected Material must comply with Civil Local Rule 79-5 and General Order 62. Protected
25 Material may only be filed under seal pursuant to a court order authorizing the sealing of the
26 specific Protected Material at issue. Pursuant to Civil Local Rule 79-5 and General Order 62, a
27 sealing order will issue only upon a request establishing that the Protected Material at issue is
28 privileged, protectable as a trade secret, or otherwise entitled to protection under the law. If a

1 Receiving Party's request to file Protected Material under seal pursuant to Civil Local Rule 79-
2 5(d) and General Order 62 is denied by the court, then the Receiving Party may file the Protected
3 Material in the public record pursuant to Civil Local Rule 79-5(e) unless otherwise instructed by
4 the court.

5 13. FINAL DISPOSITION

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

21 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

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1 Dated: February 26, 2013

WILLIAM H. WRIGHT
MICHAEL D. OWENS
Orrick, Herrington & Sutcliffe LLP

2

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4

By: /s/ William H. Wright
William H. Wright
Attorneys for Plaintiffs
DANIEL J. KANE and MESA
PHOTONICS, LLC

5

6

7 Dated: February 26 , 2013

ROBERT M. HARKINS
Sedgwick, LLP

8

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10

By: /s/ Robert M. Harkins
Robert M. Harkins
Attorneys for Defendants
KENNETH W. DELONG and FEMTOSOFT
TECHNOLOGIES

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DECLARATION OF CONSENT

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Pursuant to General Order No. 45, Section X(B) regarding signatures, I attest under penalty of perjury that concurrence in the filling of this document has been obtained from Robert Harkins.

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17

18 Dated: February 26, 2013

WILLIAM H. WRIGHT
MICHAEL D. OWENS
Orrick, Herrington & Sutcliffe LLP

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21

By: /s/ William H. Wright
WILLIAM H. WRIGHT
Attorneys for Plaintiffs
Daniel J. Kane and Mesa Photonics, LLC

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PURSUANT TO THE STIPULATION, IT IS SO ORDERED.

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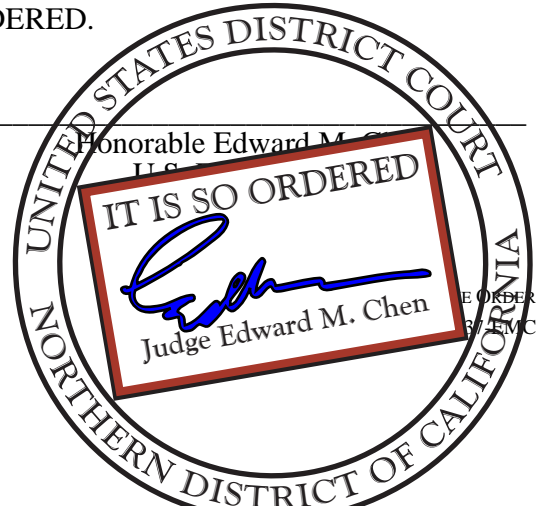
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DATED: 3/4/13

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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 *Kane v. Delong* (Case No. 3:12-cv-05437-EMC). 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]