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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CHARTIS SPECIALTY
INSURANCE COMPANY, an Illinois
corporation, for itself, and as subrogee
of Whittaker Corporation; and
WHITTAKER CORPORATION, a
Delaware corporation,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

No. CV-13-1527 EMC

[~~PROPOSED~~] STIPULATED
ORDER REGARDING THE
INADVERTENT DISCLOSURE
OF PRIVILEGED
INFORMATION

Judge: Hon. Edward M. Chen

1 The Parties by and through their respective counsel, have jointly stipulated to the terms
2 of this Stipulated Order Governing the Inadvertent Disclosure of Privileged Information, and
3 with the Court being fully advised as to the same, it is hereby ORDERED:

4 **I. APPLICABILITY**

5 1. Pursuant to Federal Rule of Evidence 502(d) this Court can order that the
6 attorney-client privilege, work product protection, and/or any other applicable privilege or
7 immunity is not waived by the disclosure of a document or other information protected by
8 these privileges either in this litigation or in any other federal or state proceeding.

9 Except as set forth in paragraph 9 below, this Order shall be applicable to and govern
10 all testimony in deposition transcripts and/or videotapes, documents produced in response to
11 requests for production of documents, answers to interrogatories, responses to requests for
12 admissions, affidavits, declarations, correspondence and all other information or material
13 produced, made available for inspection, or otherwise submitted and transmitted by any of the
14 Parties in this litigation pursuant to the Federal Rules of Civil Procedure (including disclosures
15 pursuant to FRCP 26) or pursuant to a Freedom of Information Act and/or Public Records Act
16 Request to the United States of America or subdivision thereof (“Government”), or by
17 informal exchange and communication between the Parties (collectively “Information”). The
18 treatment of Information disclosed at trial or hearings will be determined at a later date by the
19 Court pursuant to applicable federal and state law.

20 2. This Order does not excuse a Party from its obligations to undertake reasonable
21 measures to protect against the inadvertent disclosure of privileged Information.

22 **II. PRODUCTION OF MATERIALS CONTAINING POTENTIALLY
23 PRIVILEGED INFORMATION**

24 3. The inadvertent production of any privileged, work product protected or
25 otherwise exempted Information (“Protected Information”) shall not be deemed a waiver or
26 impairment of any claim of privilege, work product protection or exemption including, but not

1 limited to, the attorney-client privilege, the protection afforded to work product materials,
2 privileges afforded the Government under applicable statutory or case law or the subject
3 matter thereof as to the inadvertently produced Protected Information as long as the producing
4 Party adheres to the terms of this Order.

5 4. The producing Party must notify the receiving Party promptly, in writing,
6 within ten (10) business days of discovery that such Protected Information has been produced
7 and provide a new copy of the material with the allegedly privileged portions redacted. In
8 such notice, the producing Party must specifically identify by Bates number, or, if a Bates
9 number does not apply to the particular Information, by other similar identifying information,
10 the documents or other Protected Information produced. The producing Party must further
11 identify the reasonable measures taken to prevent inadvertent disclosure of Protected
12 Information. Any party that complies with this paragraph will be deemed to have taken
13 reasonable steps to rectify disclosures of privileged or protected information or materials.

14 5. Upon receiving written notice from the producing Party that privileged, work
15 product protected, or exempted Information has been produced, such Information, and all
16 copies thereof, shall be returned to the producing Party within fifteen (15) business days of
17 receipt of such notice unless the receiving Party challenges the exemption designation pursuant
18 to paragraph 6. The receiving Party shall not use such Protected Information for any purpose,
19 except as provided in paragraph 6, until further Order of the Court. The receiving Party shall
20 also attempt, in good faith, to retrieve and return or destroy all copies of the Protected
21 Information in electronic format.

22 6. The receiving Party may contest the privilege, work product, or other
23 exemption designation, by the producing Party. The receiving Party contesting the designation
24 shall give the producing Party written notice of the reason for contesting the privilege. The
25 receiving Party shall promptly sequester the specified information and any copies it has and
26 may not use or disclose the information, except as provided by Fed. R. Civ. P. 26(b)(5)(B),

1 until the claim is resolved. Copies of privileged documents or information that have been
2 stored on electronic media that is not reasonably accessible, such as disaster recovery backup
3 media, are adequately sequestered as long as they are not restored; if such data is restored, the
4 receiving Party must take steps to re-sequester the restored information. If the receiving Party
5 disclosed the information before being notified, it must take reasonable steps to prevent further
6 use of such information until the claim is resolved. The receiving Party, however, shall be
7 entitled to use a copy of the disputed Protected Information to resolve the designation dispute.
8 As long as the producing Party is not in material breach of this agreement, the receiving Party
9 may not challenge the designation by arguing that the mere disclosure of the Protected
10 Information itself is a waiver of any applicable privilege. In a contest over the proper
11 designation of the Information, the receiving Party shall, within fifteen (15) business days
12 from the initial notice by the producing Party, seek an Order from the Court to resolve the
13 designation dispute. The Party shall follow the procedures described in Fed. R. Civ. P.
14 26(b)(5)(B) that are not otherwise covered by this Order. Pending resolution of the dispute,
15 the Parties shall not use the challenged information for any other purpose and shall not
16 disclose it to any person other than those required by law. If no such Order is sought, upon
17 expiration of the fifteen (15) day period, all copies of the disputed Protected Information shall
18 be returned to the producing Party.

19 7. Any analyses, memoranda or notes which were internally generated based upon
20 the disputed Protected Information shall immediately be placed in sealed envelopes with
21 associated electronic information sequestered and shall be destroyed in the event that (a) the
22 receiving Party does not contest that the Protected Information is privileged or otherwise
23 protected, or (b) the Court rules that the Information is privileged or otherwise protected. Such
24 analyses, memoranda or notes may only be removed from the sealed envelopes and used for
25 their intended purposes in the event that (a) the producing Party agrees in writing that the
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1 Information is not privileged or otherwise protected, or (b) the Court rules that the Information
2 is not privileged or otherwise protected.

3 8. Nothing in this agreement shall relieve a Party of any obligation that it might
4 have regarding the use of knowingly privileged information. Nor shall a receiving Party be
5 subject to any sanction, up to and including recusal, for its review of Protected Information
6 that it did not know was subject to a claim of privilege. If a Party identifies a document that
7 appears on its face or in light of facts known to the Party to be subject to another Party's claim
8 of privilege, the Party identifying the potential claim of privilege is under a good-faith
9 obligation to notify the Party holding the potential claim of privilege. Such notification shall
10 not waive the identifying Party's ability to subsequently challenge any assertion of privilege
11 with respect to the identified document. If the Party holding the potential claim of privilege
12 wishes to assert a claim of privilege, it shall provide notice in accordance with paragraph 4
13 above within five business days of receiving notice from the identifying Party.

14 9. The foregoing procedures in this agreement shall not apply to Protected
15 Information that has been produced or otherwise provided to a person designated as a
16 testifying expert in this matter ("Testifying Expert"). To the extent a Party desires to make a
17 claim of privilege under this agreement related to Protected Information produced or otherwise
18 provided to a Testifying Expert, that Party may do so only upon a showing of good cause. In
19 determining if good cause exists, the Court shall consider, among other relevant factors, the
20 prejudice to the receiving Party caused by the claim of privilege. If a claim of privilege is
21 sustained as to Protected Information produced or otherwise provided to a Testifying Expert,
22 and the privilege claim relates to a document that the Testifying Expert relied on, then the
23 Testifying Expert shall have 30 days after the privilege claim has been resolved to produce a
24 revised report. If a revised report is produced, the prior report shall be treated as work-product
25 pursuant to Federal Rule of Civil Procedure 26 and all copies shall be returned to the
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1 producing Party. Such prior report may not be used for any purpose, including for the
2 purposes of impeachment.

3 10. Nothing in this agreement is intended to, or shall, constitute a waiver or
4 impairment of any claim, or right to raise such claim, of privilege, work product protection or
5 exemption including, but not limited to, the attorney-client privilege, the protection afforded to
6 work product materials, and privileges afforded the Government under applicable statutory or
7 case law.

8 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

9 DATED: September 10, 2013 WOOD, SMITH, HENNING & BERMAN LLP

10 By: s/ David F. Wood
11 DAVID F. WOOD
12 GREGORY P. ARAKAWA

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WHITTAKER CORPORATION

DATED: September 10, 2013 ROBERT G. DREHER
Acting Assistant Attorney General

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By: s/ John Thomas H. Do
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U.S. Department of Justice

Attorneys for Defendant,
UNITED STATES OF AMERICA

*Filer attests that concurrence in the filing has been obtained from counsel for CHARTIS SPECIALTY INSURANCE COMPANY and WHITTAKER CORPORATION.

PURSUANT TO STIPULATION, IT IS SO ORDERED.

DATED: September ²⁵____, 2013

