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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANSISCO DIVISION

WANG XIAONING, YU LING, SHI TAO, and ADDITIONAL PRESENTLY UNNAMED AND TO BE IDENTIFIED INDIVIDUALS,

Plaintiffs,

v.

YAHOO, INC., a Delaware Corporation, YAHOO! HONG KONG, LTD., a Foreign Subsidiary of Yahoo!, AND OTHER PRESENTLY UNNAMED AND TO BE IDENTIFIED CORPORATE DEFENDANTS AND UNNAMED AND TO BE IDENTIFIED INDIVIDUAL EMPLOYEES OF SAID CORPORATIONS,

Defendants.

Case No. C07-02151 CW/JCS

TORT DAMAGES CLAIM

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER GOVERNING CONFIDENTIAL INFORMATION, AND [PROPOSED] INTERIM PROTECTIVE ORDER

Magistrate Judge: Hon. Joseph C. Spero

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I. INTRODUCTION

Plaintiffs oppose Defendants' Motion for a Protective Order Governing Confidential Information submitted on August 15, 2007, on a number of grounds, including the premature timing of this request, its failure to include key elements suitable and necessary to the present case, its departure from caselaw applying protective order standards in concrete situations similar to the case at hand, and the lack of sufficient time or information necessary to deal with these important issues on a properly informed and considered basis. Defendants seek a Protective Order that will cover all document submissions throughout the entire case (pleading, discovery and trial), while only providing justification for two discrete types of documents related to just one of the Defendants' pre-trial motions (their Motion to Dismiss). No Protective Order should be issued in this case that does not incorporate provisions establishing and confirming clear and well-accepted limits on the use and coverage of protective designations consistent with prevailing case precedent.

Plaintiffs understand that Defendants had hoped to include information that they wish to be deemed confidential in their response to the Second Amended Complaint, due on August 27, 2007, and that they sought this Protective Order in order to cover these submissions. However, especially since the Defendants now are submitting their Answer without the supporting documentation they hoped to designate as confidential, Plaintiffs do not see the need for the Court to immediately approve a blanket protective order that would govern confidentiality designations for the discovery process and for the remainder of the case when the parties have such significant unresolved differences, and very little information has been provided by the Defendants regarding the nature and scope of the documents to be covered by the order, and of the confidentiality designations likely to be used during discovery.

Specifically, Plaintiffs object to Defendants' refusal to indicate in the terms of the Protective Order itself a more detailed description of the nature of the documents intended to be covered by the proposed Protective Order. This omission is contrary to protective orders in other cases and is inconsistent with precedent from the Supreme Court and from the Ninth Circuit. Plaintiffs also object to Defendants' refusal to indicate the specific legal basis for each of the

confidentiality designations they make pursuant to the Order, especially because Defendants have given every indication that they anticipate claiming confidentiality protections on a very broad – perhaps overbroad – basis. Plaintiffs also object to Defendants' refusal to acknowledge the accepted standard that documents in the public domain should not be subject to protection.

Plaintiffs also urge the Court in considering the appropriateness of the Defendants' Proposed Protective Order to take cognizance of the factual circumstances surrounding the Defendants' effort to secure acceptance of their proposal from the Plaintiffs. These facts and circumstances provide important indicators of how the Defendants are likely to misuse the Protective Order if it were accepted by the Court in the form proposed. It would extend secrecy coverage in a very broad, unjustified and poorly regulated way not called for by this case or the present circumstances.

If the court nevertheless believes there is a need for a Protective Order at this point in the litigation, Plaintiffs suggest an alternative approach: an interim arrangement providing for the confidentiality protections that Defendants seek until a Permanent Protective Order can be adopted. This alternative would avoid the necessity of adopting a permanent Protective Order on a precipitous basis, and would also address Defendants' expressed need to provide for the confidentiality of certain documents to be added to their pleadings associated with their response to the Second Amended Complaint. It is Plaintiffs' view that the Interim Protective Order proposed by Plaintiffs can be adopted and applied immediately as a temporary solution that will protect both parties, and will not force the Court to make a decision that will have long-term effects with inadequate information.

If, despite these objections, the Court finds that it is nevertheless necessary to proceed with adopting a more general Protective Order at this time rather than the Interim Order the Plaintiffs have proposed, Plaintiffs request that any such Order, at a minimum, contain the three additional provisions not included in Defendants' request, namely that:

1. the Designating Party be required to give notice and descriptions (in the text of the Protective Order itself or in a later Stipulation or Order if necessary) of the general categories of documents to be designated and covered by the Order and the justification

for their inclusion;

2. the Designating Party indicate the legal basis for each claim of confidentiality as part of the designation label; and

3. documents and information in the public domain prior to disclosure or production, or that subsequently become part of the public domain through no involvement of Plaintiffs or their counsel, be ineligible for coverage by the Protective Order.

Moreover, in terms of timing for the adoption of a permanent Protective Order, a hearing on these proposals should take place before the Magistrate Judge in connection with (and possibly the day following) the Case Management Conference, currently scheduled for October 9, so that the Court can address the timing, scope and protection of materials to be included in the discovery process concurrently with the case management hearing.

II. THE DEFENDANTS' PROPOSED PROTECTIVE ORDER IS SUBSTANTIALLY DIFFERENT FROM THE DRAFT PROTECTIVE ORDER INITIALLY SENT TO PLAINTIFFS.

It is important to note at the outset that the Proposed Protective Order is substantially different than the draft initially sent to Plaintiffs. This earlier draft, and the fact that Defendants made substantial changes in the draft before submitting it to the Court, provide important indicators of Defendants' intention to apply confidentiality protection in an overbroad and unjustified manner, and of why the additional provisions suggested by the Plaintiffs are necessary and appropriate. *Compare* Defs.' Proposed Protective Order ("Defs.' Proposed Order) *with* Defs.' Draft Protective Order, ("Defs.' Draft Order) filed herewith as Ex. A to Decl. of Morton Sklar in Supp. Of Pls.' Opp'n to Defs.' Mot. for Protective Order Governing Confidential Info. ("Sklar Decl."). Notably in the initial draft, Defendants expressly omitted language from the Model Form stating that "[m]ass, indiscriminate, or routinized designations are prohibited" from their Draft Protective Order. *Compare* Form Stipulated Protective Order for the N.D. Cal. "Form Stipulated Order"), filed herewith as Ex. B to Sklar Decl., p. 4, line 3 *with* Defs.' Draft Order, p. 4, line 11. Tellingly, Defendants re-inserted this phrase into the Proposed Protective Order filed with the Court. *See* Defs.' Proposed Order, p. 4, line 4. This omission is significant given that

the Defendants incorporated most other aspects of the sample order verbatim, except for the provision stating that mass, indiscriminate designations are prohibited.

Along similar lines, Defendants added language to the Draft Protective Order originally proposed to the Plaintiffs that was not in the Form Stipulated Order indicating that they would not bear liability for improper designations. This language was removed from the version filed with the Court. Section 12.6 of Defendants' Draft Order originally sent to the Plaintiffs stated that producing material marked as "Confidential" or "Highly Confidential" "shall not operate as an admission by any party that any Protected Material contains or reflects trade secrets or any other type of confidential or proprietary information entitled to protection under applicable law." Defs.' Draft Order, p. 13, lines 11-14. This language implies that Defendants would not be held responsible for improper designations, and that Defendants could designate materials as "Confidential" – even if the material did not constitute a trade secret or confidential business information, or was otherwise subject to confidentiality protections under any law – merely because Defendants did not want information harmful to its reputation in the public domain. In a case decided just this month, this court held that fear of public scrutiny was not a valid reason for entering a protective order. *See Humboldt Baykeeper v. Union Pacific R. Co.*, 2007 WL 2219287, *1, *6 (N.D. Cal.)

Plaintiffs stress that the modifications made to Defendants' Proposed Protective Order submitted to the Court that eliminate these objectionable variations from the Model Order Form do *not* resolve Plaintiffs' concerns regarding a Protective Order. Plaintiffs are noting these variations in order to demonstrate the need for special caution in dealing with the Defendants' proposals, and most especially the need to include the three provisions Plaintiffs propose to add to the Order, covering the need for the text of the Order itself to describe the types of documents to be covered in general, and to require that the legal basis for claiming protective status be provided as part of each individual designation, so that the Plaintiffs (and the Court if necessary) can properly assess the validity of the proposed claim for protection. Plaintiffs also stress the urgency of excluding coverage by the Order of information or items in the public domain. These three additional provisions are vitally necessary to prevent overuse of the confidentiality protections,

rather than relying upon post-designation challenges as the only means to prevent abuse of the system. Plaintiffs believe that this type of proactive and preventative approach, where the parties can understand and resolve any disagreements about the legal basis for designations prior to production or disclosure, is the best means for preventing overuse of designations and for preventing costly and time-consuming individual challenges that the Court must resolve. These preventative measures are especially important given the Defendants' demonstrated inclination to apply the protective designation process on an overly broad basis, as evidenced by the changes in the Model Order Form that they attempted to secure from the Plaintiffs, and their refusal to accept provisions aimed at preventing misuse of the system.

III. DEFENDANTS' PROPOSED PROTECTIVE ORDER IS PREMATURE AND OVERBROAD, AND SHOULD NOT BE ADOPTED.

Defendants are asking the Court to adopt a Protective Order on a premature basis that is vague and overbroad, and that would improperly place the emphasis on post-designation challenges, rather than providing clearer standards for the making of protective designations in the first instance. Moreover, Defendants' Proposed Order is inconsistent with caselaw applying protective order standards in a number of key respects. All of these deficiencies suggest that the Court does not have sufficient information at this point to be able to properly assess or adopt a permanent Protective Order along the lines proposed by the Defendants, and therefore should withhold issuing a permanent Protective Order until the Case Management Conference and/or the initiation of the discovery process.

A. Defendants' Proposed Protective Order is Over-Inclusive and Therefore Inappropriate.

Defendants inappropriately seek adoption of a blanket protective order, which "is by nature overinclusive." *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1138 (9th Cir. 2003). There is a presumption in favor of "freedom to use discovered information in any lawful manner" and "this presumption *pre-weights the scales against restricting* a party's lawful use or dissemination of discovered information." *Humboldt Baykeeper*, 2007 WL 2219287 at *2, *3 (emphasis in original); *see also Foltz*, 331 F.3d at 1135 (9th Cir. 2003). In order to overcome this

presumption, Defendants must show "good cause" for protection, or in other words, the likelihood that a specific, well-defined potential harm would result from disclosure. *See* FED. R. CIV. P. 26(c) (2007); *Humboldt Baykeeper*, 2007 WL 2219287 at *3 (citing *Pansy v. Borough of Stroudsburg,* 23 F.3d 772, 786-87 (3d Cir.1994)) (stating that "'broad allegations of harm, unsupported by specific examples or articulated reasoning,' do not support a good cause showing.") Defendants have not met this burden with respect to the vast majority of documents that they would seek to protect because they have not even described the types of documents to be covered or the reasons why protection is required. Defendants, in their latest submission, did describe the two specific types of information they seek to cover in connection with their Motion to Dismiss, due on August 27, but the language of the Proposed Order itself does not reflect that information nor provide any other description of the material to be covered, or the justification for the need for the Order. Instead, Defendants' Proposed Order authorizes Defendants to assign protected status for any reason whatsoever without explaining the need for coverage. *See* Defs.' Proposed Order, p. 2, lines 11-17. Defendants have given no indication of documentation they wish to designate as confidential during the broader discovery process. Thus, Defendants are asking the Court to approve a broad Protective Order, governing unspecified documents for all of discovery and trial, while only providing the Court with information relating to a relatively small number of documents to be included in just one small portion of the litigation, their Motion to Dismiss. This lack of specificity is inconsistent with other protective orders approved by this court. For example, the Protective Order entered in *Therasense, Inc. v. Becton, Dickinson and Co.* specifically described the items to be covered by a "Confidential Information" designation as "any party's technical information relating to blood glucose test strips and monitoring devices, and methods of producing the same." Proposed Protective Order, *Therasense, Inc. v. Becton, Dickinson and Co.*, 2005 U.S. Dist. Ct. Pleadings LEXIS 4652, *1 at *2-*3.

Defendants cite *Wood v. Vista Manor Nursing Center* to attempt to support their blanket Proposed Protective Order, but *Wood* offers no support for an overbroad Protective Order. In *Wood*, the Parties modified section five of the stipulated protective order, dealing with the designation process, and agreed that the Producing Party would provide an undesignated copy to

the Receiving Party for inspection prior to designation. *Wood v. Vista Manor Nursing Center*, 2007 WL 832933 (N.D.Cal.), *1 at *2. The court was concerned that duplicate, unmarked copies could create confusion and increase the risk of inadvertent disclosure, and denied the modification. *Id.* The court did *not* indicate any support for blanket protective orders that did not include descriptions of the type of documents to be covered or the justification for their inclusion. Given the logic of the opinion, it is likely that the court would require the protective order to provide a better indication of the nature and scope of future designations that were covered by the Order, while still protecting the Disclosing Party from improper disclosure.

Defendants' Proposed Protective Order also is inconsistent with case precedent in the Supreme Court and in the Ninth Circuit in several other important respects. In *Seattle Times Co. v. Rhinehart,* the Supreme Court noted that "[i]n addressing that question [of appropriateness of a protective order] it is necessary to consider whether the 'practice in question [furthers] an important or substantial governmental interest unrelated to the suppression of expression' and whether 'the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest involved.'" *Seattle Times Co. v. Rhinehart,* 467 U.S. 20, 32 (U.S. 1984) (citations omitted). In a decision issued this month, this court applied this principle in denying a proposed protective order, noting that "in at least some instances a protective order could be vulnerable to constitutional attack on the ground that the prohibitions it imposes reach appreciably farther than would be necessary to secure the important public ends that are proffered in support of issuance of the order." *Humboldt Baykeeper*, 2007 WL 2219287 at *2 (referring to the second prong of the reasoning in *Seattle Times*). The human rights and corporate accountability aspects of the present case would seem to meet this "important public ends" objective.

The type of blanket and overbroad protective order that the Defendants propose is inappropriate because the case at hand requires as much transparency as possible without compromising Defendants' protectable interests. This court has stated that "[a] presumptive prohibition against any use of discovered information outside the litigation might impair the ability of the public…to identify the sources and scope of invasions of important rights [] thus

compromising society's ability to take appropriate prophylactic or corrective action…[and] would seem to run counter to the spirit that animates sunshine laws in many states." *Humboldt Baykeeper*, 2007 WL 2219287 at *8 n.2. Entering a blanket protective order in a human rights case would create just such an unjustified and unexplained presumption. As in *Humboldt Baykeeper*, this litigation has significant public importance, and the protective order should be carefully crafted in order to protect Defendants' legitimate business interests while allowing transparency and public access to the information to the greatest extent possible.

B. Defendants' Proposed Order Would Not Provide Sufficiently Clear Standards On What Documents and Items Of Information Are Covered, Placing Too Much Emphasis On the Challenge Process to Secure Compliance.

Defendants' Proposed Protective Order is not consistent with prevailing caselaw that places the burden of demonstrating possible harm on the party seeking the confidentiality designation. Specifically, the Proposed Order, by permitting overly broad use of protective designations without explanation of their relevance, or a description of the legal basis for their claim, would improperly place too great an emphasis on post-designation challenges, and would place too heavy a burden on the Receiving Party and the Court to deal with these challenges. The Ninth Circuit has stated that "The burden is on the party requesting a protective order to demonstrate that (1) the material in question is a trade secret or other confidential information within the scope of Rule 26(c), and (2) disclosure would cause an identifiable, significant harm." *Foltz*, 331 F.3d at 1131 (quoting *Deford v. Schmid Products Co.*, 120 F.R.D. 648, 653(D. Md., 1987)). The Defendants have not provided any information that would support this burden.

By seeking a blanket Protective Order with no preliminary enforcement mechanism or method for explaining the basis for proposed designations, Defendants are attempting to shift the burden and costs of compliance to the Plaintiffs and the formal challenge process, without providing an adequate basis upon which the Receiving Party or the court can judge the appropriateness of the designation. Defendants' Proposed Order would give them virtually boundless discretion without requiring a showing of the basis for a protective designation, and would force the Plaintiffs to individually challenge each potentially improper designation without

being provided the information on the legal basis for the claim, or the justification for its being needed, that would make a reasonable assessment of the legitimacy of the claim possible. In other words, as proposed by the Defendants, the Protective Order would encourage and facilitate vastly overbroad and unjustified use of designations, forcing the Plaintiffs and the Court to expend considerable time and effort on numerous individual challenges.

This problem is magnified because the Proposed Protective Order is written to apply to the entire discovery and litigation process, whereas Defendants have only provided a description for their proposed designations to the very limited number of documents they want to disclose in connection with their Motions to Dismiss. At a minimum, whether in permanent form, or on the interim basis the plaintiffs have proposed, any Protective Order must include within its text provisions describing in general terms the types of documents and items of information to be covered, and the reasons for their coverage, must require each designation to indicate the legal basis for the protection claimed in its confidentiality marking, and must indicate that information in the public record is not covered by the Protective Order.

C. Plaintiffs Have Incorporated Some of Defendants' Language Explaining the Justification for Designation Into Their Proposed Interim Protective Order.

Plaintiffs have incorporated part of Defendants' descriptions of potentially protected documents relating to their Motions to Dismiss into Plaintiffs' Proposed Interim Protective Order, in an effort to help correct the overbroad nature of Defendants' Proposed Order as it applies to these limited submissions. This language relates to the methodology used to track user traffic on Defendants' websites, which may very well be proprietary information. *See* Pls.' Proposed Interim Protective Order ("Pls.' Interim Order"), p. 2, § 2.3(a); Defs.' Mot. for Protective Order Governing Confidential Information ("Defs.' Mot."), page 2, lines 21-28. This description of documents to be submitted with their Motion to Dismiss that they hoped to have covered by the Proposed Protective Order was the only indication provided by the Defendants as to the type of documents Defendants seek to protect under their proposed Order.

This situation demonstrates precisely why a blanket order in the form proposed by Defendants should not be adopted, and why the three additional provisions proposed by the

Plaintiffs provide the minimum standards that are necessary to present overbroad coverage in conformity with prevailing case precedent.

D. The Protective Order Should Not Apply to Information That Is In the Public Domain.

Information that is in the public domain is recognized as being ineligible for protected status, but would be covered by Defendants' Proposed Order. In our negotiations, Defendants refused to consider adding language exempting such information, stating that Plaintiffs were seeking to "dilute" the protections available to Defendants. Plaintiffs wish to stress that they are not seeking to interfere with any valid rights to keep information or documents confidential, but are merely seeking to ensure that the Protective Order that is issued is appropriate in scope. It is widely recognized that documents that are part of the public domain prior to designation, or that become part of the public domain after designation – without the involvement of the Plaintiffs or their attorneys – are not covered by protective status. Forcing Plaintiffs to observe confidentiality provisions for documents and information that have been publicly disseminated through actions unrelated to this pending litigation would restrict the Plaintiffs' and the public's right to free speech and access to information without providing Defendants with any added protection. The Supreme Court noted that "a protective order prevents a party from disseminating only that information obtained through use of the discovery process. Thus, the party may disseminate the identical information covered by the protective order as long as the information is gained through means independent of the court's processes." *Seattle Times*, 467 U.S. at 34; *see also Humboldt Baykeeper*, 2007 WL 2219287 at *1 (noting that "the [Supreme] Court [in *Seattle Times*] squarely acknowledged that the First Amendment imposes some restraints on issuance of protective orders."). Thus, a protective order may not impose restrictions on expression for documents that could be accessed outside of the litigation. Plaintiffs' proposed provision to that effect is firmly supported by this Supreme Court precedent.

Plaintiffs' proposed language indicating that documents in the public domain are not eligible for protected status is very similar to the provision to that effect included in another Protective Order issued in the Northern District of California. *Compare* Pls.' Interim Order, page

5, § 5.2 *with* Stipulated Protective Order, *Genesis Microchip (Delaware) Inc., v. Media Reality Technologies, Inc.*, 2002 U.S. Dist. Ct. Pleadings 1300, *1, *2 (N.D. Cal.). This provision is designed to prevent a situation in which the Plaintiffs or their counsel are silenced on a particular issue, even though it has been widely reported in the media, simply because Defendants chose to designate this public information as protected material.

E. A General Protective Order Is Not Necessary or Appropriate at This Point.

Adopting a general Protective Order at this point in the proceedings would be premature and unnecessary. Defendants seek a Protective Order that will cover all Defendants' documentary submissions throughout the entire case (pleading, discovery and trial), while only providing justification for coverage of two discrete types of documents relating to the Defendants' Motion to Dismiss. Defendants' Motion for a Protective Order Governing Confidential Information explains its reasoning and justification for seeking protective designations in connection to Defendant YHKL's Motion to Dismiss, but does not even address the bases for confidentiality designations beyond that very limited submission. Plaintiffs urge the Court to defer entering a general Protective Order governing the discovery process and other aspects of the case until more information is known about the types of information to be covered by that process, and whether they are likely to be subject to valid legal claims of confidentiality. It would be more logical to address protective treatment of discovery material in the context of broader consideration of the discovery issues, perhaps concurrently with the Case Management Conference presently scheduled for October 9.

In addition, third parties may wish to comment on the appropriateness of protective designations, and should be allowed a chance to present their views during that process. Because this case involves significant media and public attention, it may well be appropriate to obtain the views of the media on important elements of the protective order, including the breadth of designations allowed and the inclusion of a public information exception. *See, e.g., Proctor & Gamble v. Bankers Trust*, 78 F.3d 219, 225 (6th Cir. 1996).

If the Court feels obligated to deal with all Protective Order issues at this time, rather than awaiting the case management conference, then the Interim Protective Order, as proposed by

Plaintiffs should be adopted. It will resolve the current need for confidentiality protection in the context of the Motions to Dismiss submissions without forcing the Court to adopt a more general order covering discovery and other litigation issues for which it has no information.

IV. PLAINTIFFS' MODIFICATIONS TO THE PROTECTIVE ORDER ARE NECESSARY AND APPROPRIATE.

No Protective Order should be issued in this case that does not incorporate provisions establishing and confirming clear and well-accepted limits on the use and coverage of protective designations consistent with prevailing case precedent. These include the necessity to (1) provide a description in the Protective Order itself of the types of documents and information to be covered and the justification for their inclusion, (2) explain the legal basis for a claim of protection as part of each individual designation,[1] and (3) exclude documents and information from coverage under the Order that are part of the public domain. Such provisions should be included in a permanent Protective Order if and when it is issued, or in an Interim Order covering only the upcoming Motion to Dismiss pleadings, if an interim order along these lines is deemed necessary.

Should the Court feel it necessary to issue a Protective Order at this point, Plaintiffs urge the Court to adopt Plaintiffs' Proposed Interim Protective Order. Plaintiffs started with the Model Stipulated Protective Order from the Northern District of California website, and then added language that addresses the specific facts of this case, accepting some of Defendants' modifications as reflected in their Proposed Protective Order, and incorporating information from Defendants' Motion indicating the types of material eligible for designation. Plaintiffs acknowledge that there could well be other categories of information that should appropriately be protected, and acknowledged as much in Sections 2.3(b) and 2.4(a). Plaintiffs included this language to allow Defendants to seek protection of additional categories of items through later stipulations or court orders, without relying on an improper blanket protective order. The

[1] For example, information pertaining to the methods by which Defendants track website traffic should be labeled "Confidential: Proprietary Methodology Used for Tracking Website Visitors." Pls.' Prelim Order, p. 2, line 19. Contrary to Defendants' assertion, this would not be overly burdensome or equivalent to the amount of work involved in a privilege log. This label would provide Plaintiffs with necessary information in order to understand the basis for designation.

confidentiality designation should indicate the degree of confidentiality attached, reference the general category of protected information under which the document falls, and describe the legal basis for the confidentiality claim. *See* Pls.' Interim Order, §§ 2.3(a)-(b), p. 2, lines 16-22; *Id.* § 2.4(a), p. 3, lines 3-5; *Id.* § 5.1, p. 4, line 25-27.

Plaintiffs also have incorporated several minor changes in language to the Model Protective Order Form reflecting how the Order would apply to Plaintiffs and their counsel, rather than to corporate parties with traditional in-house and outside counsel legal arrangements, since the model order refers primarily to cases where both Plaintiffs and Defendants are corporate entities. Along these lines, Plaintiffs have modified section 7.2(b) to address both individual and corporate parties, and sections 2.9, 2.11 and 7.2(a) to better reflect Plaintiffs' legal arrangement. *See* Pls.' Interim Mot., § 7.2(b), p. 9, lines 8-11; *id.* § 2.9, p. 3, lines 15-16; *id.* § 2.11, p. 3, line 19; *id.* § 7.2(a), p. 9, line 5.

V. CONCLUSION

Defendants' Proposed Protective Order is inappropriate and unnecessary at this point in the proceedings. Defendants' Proposed Protective Order is over-inclusive and inconsistent with the standards set out in Supreme Court and Ninth Circuit decisions, as well as precedent within the Northern District of California. Defendants seek to improperly shift the burden of establishing coverage by forcing the Plaintiffs to file numerous challenges to improper designations after the documents have been provided, rather than incorporating the standards in the Order that would discourage and prevent overuse of the process. Under no circumstances should material in the public domain be covered by the Protective Order. Nor should a general Protective Order be considered necessary or appropriate at this point, given that Defendants have only provided reasons for protection of documents relating to the Motion to Dismiss, not to the general discovery process.

If the Court feels obliged to issue a Protective Order at this point, it should adopt the Plaintiffs' Proposed Interim Protective Order to protect information immediately forthcoming in the Motion to Dismiss briefing process, and should address the issue of a Protective Order governing production of documents more generally in the broader context of discovery

concurrently with the Case Management Conference. This proposed course of action would immediately provide protection for documents relating to Defendants' Motion to Dismiss without forcing the Court to issue an order relating to discovery and other aspects of the litigation, about which it presently has little or no information at this point in the proceedings. Rather, the parties should use the meet and confer process and a hearing on these issues concurrent with the Case Management Conference to further develop the issues relating to protective designations in the context of discovery, either resolving the issues between themselves, or presenting the Court with the issues the Parties cannot resolve.

If and when the Court does consider adoption of a permanent Protective Order, the Court should incorporate Plaintiffs' modifications, requiring that the Order describe the categories of protected information to be covered and the reasons for their inclusion, requiring each designation to indicate the legal basis under which the claim of protection is being made, and excluding public information from coverage by the Order.

Respectfully submitted this 27th day of August, 2007, by

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CERTIFICATE OF COMPLIANCE

This reply on behalf of Plaintiffs Wang Xiaoning, Yu Ling, Shi Tao and Additional Presently Unnamed and To Be Identified Individuals complies with all Federal and Local Rule requirements including the page limit of 25 narrative pages.

Signed and Certified to this 27th day of August, 2007.

By: */s/ Morton Sklar*

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