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 FCE BENEFIT ADMINISTRATORS, INC.

8 **UNITED STATES DISTRICT COURT**  
 9 **NORTHERN DISTRICT OF CALIFORNIA**

11 MIDWEST TRANSPORT, INC. ,  
 12 Plaintiff,  
 13 v.  
 14 FCE BENEFIT ADMINISTRATORS,  
 15 INC. ,  
 16 Defendant.

Case No. 07-04408 CW

**STIPULATED PROTECTIVE ORDER**

17 1. PURPOSES AND LIMITATIONS

18 Disclosure and discovery activity in this action are likely to involve production of  
 19 confidential, proprietary, or private information for which special protection from public  
 20 disclosure and from use for any purpose other than prosecuting this litigation would be warranted.  
 21 Accordingly, the parties hereby stipulate to and petition the Court to enter the following  
 22 Stipulated Protective Order. The parties acknowledge that this Order does not confer blanket  
 23 protections on all disclosures or responses to discovery and that the protection it affords extends  
 24 only to the limited information or items that are entitled under the applicable legal principles to  
 25 treatment as confidential. The parties further acknowledge, as set forth in Section 10 below, that  
 26 this Stipulated Protective Order creates no entitlement to file confidential information under seal;  
 27 Civil Local rule 79-5 sets forth the procedures that must be followed and reflects the standards  
 28 that will be applied when a party seeks permission from the Court to file material under seal.

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1           2.     DEFINITIONS

2           2.1     Party: any party to this action, including all of its officers, directors,  
3 employees, consultants, retained experts, and outside counsel (and their support staff).

4           2.2     Disclosure or Discovery Material: all items or information, regardless of  
5 the medium or manner generated, stored, or maintained (including, among other things,  
6 testimony, transcripts, or tangible things) that are produced or generated in disclosures or  
7 responses to discovery in this matter.

8           2.3     “Confidential” Information or Items: information (regardless of how  
9 generated, stored or maintained) or tangible things that qualify for protection under standards  
10 developed under F.R.Civ.P.26(c).

11          2.4     Receiving Party: a Party that receives Disclosure or Discovery Material  
12 from a Producing Party.

13          2.5     Producing Party: a Party or non-party that produces Disclosure or  
14 Discovery Material in this action.

15          2.6     Designating Party: a Party or non-party that designates information or  
16 items that it produces in disclosures or in responses to discovery as “Confidential.”

17          2.7     Protected Material: any Disclosure or Discovery Material that is  
18 designated as “Confidential.”

19          2.8     Outside Counsel: attorneys who are not employees of a Party but who are  
20 retained to represent or advise a Party in this action.

21          2.9     House Counsel: attorneys who are employees of a Party.

22          2.10    Counsel (without qualifier): Outside Counsel and House Counsel (as well  
23 as their support staffs).

24          2.11    Expert: a person with specialized knowledge or experience in a matter  
25 pertinent to the litigation who has been retained by a Party or its counsel to serve as an expert  
26 witness or as a consultant in this action and who is not a past or current employee of an opposing  
27 Party. This definition includes a professional jury or trial consultant retained in connection with  
28 this litigation.

1                   2.12 Professional Vendors: persons or entities that provide litigation support  
2 services (e.g., photocopying; videotaping; translating; preparing exhibits or demonstrations;  
3 organizing, storing, retrieving data in any form or medium; etc.) and their employees and  
4 subcontractors.

5                   3.       SCOPE

6                   The protections conferred by this Stipulation and Order cover not only Protected Material  
7 (as defined above), but also any information copied or extracted therefrom, as well as all copies,  
8 excerpts, summaries, or compilations thereof, plus testimony, conversations, or presentations by  
9 parties or counsel to or in court or in other settings that might reveal Protected Material.

10                  4.       DURATION

11                  Even after the termination of this litigation, the confidentiality obligations imposed by this  
12 Order shall remain in effect until a Designating Party agrees otherwise in writing or a court order  
13 otherwise directs.

14                  5.       DESIGNATING PROTECTED MATERIAL

15                  5.1     Exercise of Restraint and Care in Designating Materials for Protection.

16                  Each Designating Party must take care to limit any “Confidential” designation to specific material  
17 that qualifies under the appropriate standards. A Designating Party also must take care to limit  
18 “Confidential” designations to only those parts of material, documents, items or oral or written  
19 communications that qualify – so that other portions of the material, documents, items, or  
20 communications for which protection is not warranted are not swept unjustifiably within the  
21 ambit of this Order.

22                  If it comes to a Designating Party’s attention that information or items that it  
23 designated for protection do not qualify for the level of protection initially asserted, that  
24 Designating Party must promptly notify all other parties that it is withdrawing the mistaken  
25 designation.

26                  5.2 Manner and Timing Designations. Except as otherwise provided in this Order  
27 (see e.g., second paragraph of section 5.2(a), below), or as otherwise stipulated or ordered,  
28 material that qualifies for protection under this Order must be clearly so designated before the

1 material is disclosed or produced. This provision is meant to apply to any documents produced  
2 prior to the date of this Order which were indicated to have been produced in a confidential  
3 manner, including, but not limited to documents previously produced by FCE Benefit  
4 Administrators, Inc. and affixed with the label “CONFIDENTIAL.”

5 Designation in conformity with this Order requires:

6 (a) for information in documentary form (apart from transcripts of  
7 depositions or other pretrial or trial proceedings), that the Designating Party affix the legend  
8 “CONFIDENTIAL,” at the top or bottom of the front page of each document that contains  
9 protected material in a fashion that is easily identifiable. If only a portion or portions of the  
10 material on a page qualifies for protection, the Designating Party also must clearly identify the  
11 protected portion(s) (e.g., by making appropriate markings in the margins).

12 A Producing Party that makes original documents or materials available for  
13 inspection need not designate them for protection until after the inspecting Party has indicated  
14 which material it would like copied and produced. During the inspection and before the  
15 designation, all of the material made available for inspection shall be deemed Confidential. After  
16 the inspecting Party has identified the documents it wants copied and produced, the Producing  
17 Party must determine which documents, or portions thereof, qualify for protection under this  
18 Order, then, before producing the specified documents, the Producing/Designating Party must  
19 affix the appropriate legend “CONFIDENTIAL” at the top of each page that contains Protected  
20 Material. If only a portion or portions of the material on a page qualifies for protection, the  
21 Producing Party also must clearly identify the protected portion(s) (e.g., by making appropriate  
22 markings in the margins).

23 (b) for testimony given in deposition or in other pretrial or trial  
24 proceedings, that the Party or non-party offering or sponsoring the testimony identify on the  
25 record, before the close of deposition, hearing, or other proceeding, that testimony is entitled to  
26 protection. The Party or non-party that sponsors, offers, or gives the testimony may invoke on the  
27 record (before the deposition or proceeding is concluded) a right to have up to 30 days to identify  
28 the specific portions of the testimony as to which protection is sought. Only those portions of the

1 testimony that are appropriately designated for protection within the 30 days shall be covered by  
2 the provisions of this Stipulated Protective Order.

3 Transcript pages containing Protected Material must be separately bound  
4 by the court reporter, who must affix to the top of each page the legend “CONFIDENTIAL,” or  
5 as instructed by the Party or non-party offering or sponsoring the witness or presenting the  
6 testimony.

7 (c) for information produced in some form other than documentary, and  
8 for any other tangible things, that the Producing/Designating Party affix in a prominent place on  
9 the exterior of the container or containers in which the information or item is stored the legend  
10 “CONFIDENTIAL.” If only portions of the information or item warrant protection, the  
11 Producing/Designating Party, to the extent practicable, shall identify the protected portions.

12 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent  
13 failure to designate qualified information or items as “CONFIDENTIAL” does not, standing  
14 alone, waive the Designating Party’s right to secure protection under this Order for such material.  
15 If material is appropriately designated as “CONFIDENTIAL” after the material was initially  
16 produced, the Receiving Party, on timely notification of the designation, must make reasonable  
17 efforts to assure that the material is treated in accordance with the provisions of this Order.

18 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

19 6.1 Timing of Challenges. Unless a prompt challenge to a Designating  
20 Party’s confidentiality designation is necessary to avoid foreseeable substantial unfairness,  
21 unnecessary economic burdens, or a later significant disruption or delay of the litigation, a Party  
22 does not waive its right to challenge a confidentiality designation by electing not to mount a  
23 challenge promptly after the original designation is disclosed.

24 6.2 Meet and Confer. A Party that elects to initiate a challenge to a  
25 Designating Party’s confidentiality designation must do so in good faith and must begin the  
26 process by conferring directly (in voice to voice dialogue; other forms of communication are not  
27 sufficient) with counsel for the Designating Party. In conferring, the challenging Party must  
28 explain the basis for its belief that the confidentiality designation was not proper and must give

1 the Designating Party an opportunity to review the designated material, to reconsider the  
2 circumstances, and, if no change in designation is offered, to explain the basis for the chosen  
3 designation. A challenging Party may proceed to the next stage of the challenge process only if it  
4 has engaged in this meet and confer process first.

5         6.3     Judicial Intervention. A Party that elects to press a challenge to a confidentiality  
6 designation after considering the justification offered by the Designating Party may file and serve  
7 a motion under Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5, if applicable)  
8 that identifies the challenged material and sets forth in detail the basis for the challenge. Each  
9 such motion must be accompanied by a competent declaration that affirms that the movant has  
10 complied with the meet and confer requirements imposed in the preceding paragraph and that sets  
11 forth with specificity the justification for the confidentiality designation that was given by the  
12 Designating Party in the meet and confer dialogue.

13                 The burden of persuasion in any such challenge proceeding shall be on the  
14 Designating Party. Until the court rules on the challenge, all parties shall continue to afford the  
15 material in question the level of protection to which it is entitled under the Producing Party's  
16 designation.

17                 7.     ACCESS TO AND USE OF PROTECTED MATERIAL

18                 7.1     Basic Principles. A Receiving Party may use Protected Material that is  
19 disclosed or produced by a Designating Party in connection with this case only for prosecuting,  
20 defending, or attempting to settle this litigation. Such Protected Material may be disclosed only  
21 to the categories of persons and under the conditions described in this Order. When the litigation  
22 has been terminated, a Receiving Party must comply with the provisions of section 11, below  
23 (FINAL DISPOSITION).

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

26                 7.2     Disclosure of "CONFIDENTIAL" Information or Items. Unless otherwise  
27 ordered by the Court or permitted in writing by the Designating Party, a Receiving Party may  
28 disclose any information or item designated CONFIDENTIAL only to:

1 (a) the Receiving Party's Outside Counsel of record in this action, as  
2 well as employees of said Counsel to whom it is reasonably necessary to disclose the information  
3 for this litigation, who by signature of their counsel of record hereto agree to be bound by the  
4 provisions of this Order;

5 (b) the officers, directors, and House Counsel of the Receiving Party to  
6 whom disclosure is reasonably necessary for this litigation, who by this signature of their counsel of  
7 record hereto agree to be bound by the provisions of this Order; other employees of the Receiving  
8 Party to whom disclosure is reasonably necessary for this litigation and who have signed the  
9 "Agreement to Be Bound by Protective Order" (Exhibit A);

10 (c) experts (as defined in this Order) of the Receiving Party to whom  
11 disclosure is reasonably necessary for this litigation and who have signed the "Agreement to Be  
12 Bound by Protective Order" (Exhibit A);

13 (d) the Court and its personnel;

14 (e) court reporters, their staffs, and professional vendors to whom  
15 disclosure is reasonably necessary for this litigation and who have signed the "Agreement to Be  
16 Bound by Protective Order" (Exhibit A);

17 (f) during their depositions, witnesses in the action to whom disclosure  
18 is reasonably necessary and who have signed the "Agreement to Be Bound by Protective Order"  
19 (Exhibit A). Pages of transcribed deposition testimony or exhibits to depositions that reveal  
20 Protected Material must be separately bound by the court reporter and may not be disclosed to  
21 anyone except as permitted under this Stipulated Protective Order.

22 (g) the author of the document or the original source of the  
23 information.

24 8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN  
25 OTHER LITIGATION

26 If a Receiving Party is served with a subpoena or an order issued in other litigation that  
27 would compel disclosure of any information or items designated in this action as  
28 "CONFIDENTIAL," the Receiving Party must so notify the Designating Party, in writing (by fax, if

1 possible) immediately and in no event more than three court days after receiving the subpoena or  
2 order. Such notification must include a copy of the subpoena or court order.

3 The Receiving Party also must immediately inform in writing the Party who caused the  
4 subpoena or order to issue in the other litigation that some or all the material covered by the  
5 subpoena or order is the subject of this Protective Order. In addition, the Receiving Party must  
6 deliver a copy of this Stipulated Protective Order promptly to the Party in the other action that  
7 caused the subpoena or order to issue.

8 The purpose of imposing these duties is to alert the interested parties to the existence of  
9 this Protective Order and to afford the Designating Party in this case an opportunity to try to protect  
10 its confidentiality interests in the court from which the subpoena or order issued. The  
11 Designating Party shall bear the burdens and the expenses of seeking protection in that court of its  
12 confidential material - and nothing in these provisions should be construed as authorizing or  
13 encouraging a Receiving Party in this action to disobey a lawful directive from another court.

14 9. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

15 If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected  
16 Material to any person or in any circumstance not authorized under this Stipulated Protective  
17 Order, the Receiving Party must immediately (a) notify in writing the Designating Party of the  
18 unauthorized disclosures, (b) use its best efforts to retrieve all copies of the Protected Material,  
19 (c) inform the person or persons to whom unauthorized disclosures were made of all the terms of  
20 this Order, and (d) request such person or persons to execute the “Acknowledgment and  
21 Agreement to Be Bound” that is attached hereto as Exhibit A.

22 10. FILING PROTECTED MATERIAL

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

27 If a Party receives or has received Protected Material from a source other than in  
28 connection with this litigation, then the Receiving Party is not required to treat such information



1 received from such other source as Protected Material, provided that the other source disclosing  
2 such information was not in violation of this Order and the Receiving Party has no knowledge or  
3 reason to have knowledge of such violation. Notwithstanding the foregoing, nothing in this  
4 Order shall be construed to affect any confidentiality obligation under applicable federal or state  
5 law.

6 11. FINAL DISPOSITION

7 Unless otherwise ordered or agreed in writing by the Designating Party, within sixty  
8 days after the final termination of this action, each Receiving Party must return all Protected  
9 Material to the Designating Party. As used in this subdivision, “all Protected Material”  
10 includes all copies, abstracts, compilations, summaries or any other form of reproducing or  
11 capturing any of the Protected Material, except for Protected Material covered by the  
12 attorney-client privilege or the attorney work product doctrine, pleadings filed in this action,  
13 transcriptions, deposition, trial or hearing exhibits and discovery responses which shall remain  
14 subject to the Protective Order as set forth in Section 4 (DURATION) above. With permission  
15 in writing from the Designating Party, the Receiving Party may destroy some or all of the  
16 Protected Material instead of returning it. Whether the Protected Material is returned or  
17 destroyed, the Receiving Party must submit a written certification to the Designating Party by  
18 the sixty day deadline that identifies (by category, where appropriate) all the Protected Material  
19 that was returned or destroyed and that affirms that the Receiving Party has not retained any  
20 copies, abstracts, compilations, summaries or other forms of reproducing or capturing any of the  
21 Protected Material except as otherwise allowed in this Section.

22 12. MISCELLANEOUS

23 12.1 Right to Further Relief. Nothing in this Order abridges the right of any  
24 person to seek its modification by the Court in the future.

25 12.2 Right to Assert Other Objections. By stipulating to the entry of this  
26 Protective Order no Party or non-party waives any right it otherwise would have to object to  
27 disclosing or producing any information or item on any ground not addressed in this Stipulated  
28

1 Protective Order. Similarly, no Party waives any right to object on any ground to use in evidence  
2 of any of the material covered by this Protective Order.

3 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.  
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5 Dated: November 25, 2008

CARMODY MACDONALD P.C.

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By: /s/ David P. Stoeberl  
DAVID P. STOEBERL  
Attorneys for Plaintiffs  
MIDWEST TRANSPORT, INC.

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Dated: November 25, 2008

FILICE BROWN EASSA & McLEOD LLP

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By: /s/ Sabrina Karels  
ROBERT D. EASSA  
SABRINA R. KARELS  
Attorneys for Defendant  
FCE BENEFITS ADMINSTRATORS, INC.

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Dated: November 25, 2008

MANNING & MARDER, ET AL.

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By: /s/ Michael Smith  
MICHAEL L. SMITH  
Attorneys for Defendant and Cross-Claimant  
CALIFIA DEVELOPMENT CORPORATION  
D/B/A CDC INSURANCE SERVICES

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22 **PURSUANT TO STIPULATION, IT IS SO ORDERED.**

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Dated: 12/5/08



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THE HONORABLE CLAUDIA WILKEN

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**EXHIBIT A**

**ACKNOWLEDGMENT AND AGREEMENT TO E 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 *Midwest Transport, Inc. v. FCE Benefit Administrators, Inc., et al., USDC Case No. C07-4408 CW*. 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 \_\_\_\_\_ of \_\_\_\_\_ 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: \_\_\_\_\_

Signature: \_\_\_\_\_

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