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10 **UNITED STATES DISTRICT COURT**  
 11  
 12 **NORTHERN DISTRICT OF CALIFORNIA**

13 TRUSTEES of the NORTHERN CALIFORNIA  
 14 TILE INDUSTRY PENSION TRUST FUND, *et*  
 15 *al.*,

16 Plaintiffs,

17 v.

18 PEACOCK TILE AND MARBLE, INC., *et al.*,

19 Defendants.  
20  
21  
22

) Case No. CV 11-3859 DMR

) **STIPULATED PROTECTIVE ORDER**

) Judge: Magistrate Judge Donna Ryu

23 **STIPULATED PROTECTIVE ORDER**

24 **1. PURPOSES AND LIMITATIONS**

25 Disclosure and discovery activity in this action are likely to involve production of  
 26 confidential, proprietary, or private information for which special protection from public  
 27 disclosure and from use for any purpose other than prosecuting this litigation may be warranted.  
 28

1 Accordingly, the parties hereby stipulate to and petition the court to enter the following Stipulated  
2 Protective Order. The parties acknowledge that this Order does not confer blanket protections on  
3 all disclosures or responses to discovery and that the protection it affords from public disclosure  
4 and use extends only to the limited information or items that are entitled to confidential treatment  
5 under the applicable legal principles. The parties further acknowledge, as set forth in Section 12.3,  
6 below, that this Stipulated Protective Order does not entitle them to file confidential information  
7 under seal; Civil Local Rule 79-5 and General Order 62 set forth the procedures that must be  
8 followed and the standards that will be applied when a party seeks permission from the court to  
9 file material under seal.

## 10 **2. DEFINITIONS**

11 2.1 Challenging Party: a Party or Non-Party that challenges the designation of  
12 information or items under this Order.

13 2.2 “CONFIDENTIAL” Information or Items: information (regardless of how it is  
14 generated, stored or maintained) or tangible things that qualify for protection under Federal Rule  
15 of Civil Procedure 26(c).

16 2.3 Counsel (without qualifier): Outside Counsel of Record and House Counsel (as  
17 well as their support staff).

18 2.4 Designating Party: a Party or Non-Party that designates information or items that it  
19 produces in disclosures or in responses to discovery as “CONFIDENTIAL.”

20 2.5 Disclosure or Discovery Material: all items or information, regardless of the  
21 medium or manner in which it is generated, stored, or maintained (including, among other things,  
22 testimony, transcripts, and tangible things), that are produced or generated in disclosures or  
23 responses to discovery in this matter.

24 2.6 Expert: a person with specialized knowledge or experience in a matter pertinent to  
25 the litigation who has been retained by a Party or its counsel to serve as an expert witness or as a  
26 consultant in this action.

27 2.7 House Counsel: attorneys who are employees of a party to this action. House  
28 Counsel does not include Outside Counsel of Record or any other outside counsel.

1           2.8    Non-Party: any natural person, partnership, corporation, association, or other legal  
2 entity not named as a Party to this action.

3           2.9    Outside Counsel of Record: attorneys who are not employees of a party to this  
4 action but are retained to represent or advise a party to this action and have appeared in this action  
5 on behalf of that party or are affiliated with a law firm which has appeared on behalf of that party.

6           2.10 Party: any party to this action, including all of its officers, directors, employees,  
7 consultants, retained experts, and Outside Counsel of Record (and their support staffs).

8           2.11 Producing Party: a Party or Non-Party that produces Disclosure or Discovery  
9 Material in this action.

10          2.12 Professional Vendors: persons or entities that provide litigation support services  
11 (e.g., photocopying, videotaping, translating, preparing exhibits or demonstrations, and  
12 organizing, storing, or retrieving data in any form or medium) and their employees and  
13 subcontractors.

14          2.13 Protected Material: any Disclosure or Discovery Material that is designated as  
15 “CONFIDENTIAL.”

16          2.14 Receiving Party: a Party that receives Disclosure or Discovery Material from a  
17 Producing Party.

### 18 **3.   SCOPE**

19          The protections conferred by this Stipulation and Order cover not only Protected Material  
20 (as defined above), but also (1) any information copied or extracted from Protected Material; (2)  
21 all copies, excerpts, summaries, or compilations of Protected Material; and (3) any testimony,  
22 conversations, or presentations by Parties or their Counsel that might reveal Protected Material.  
23 However, the protections conferred by this Stipulation and Order do not cover the following  
24 information: (a) any information that is in the public domain at the time of disclosure to a  
25 Receiving Party or becomes part of the public domain after its disclosure to a Receiving Party as a  
26 result of publication not involving a violation of this Order, including becoming part of the public  
27 record through trial or otherwise; and (b) any information known to the Receiving Party prior to  
28 the disclosure or obtained by the Receiving Party after the disclosure from a source who obtained

1 the information lawfully and under no obligation of confidentiality to the Designating Party. Any  
2 use of Protected Material at trial shall be governed by a separate agreement or order.

#### 3 **4. DURATION**

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

#### 11 **5. DESIGNATING PROTECTED MATERIAL**

12 5.1 Exercise of Restraint and Care in Designating Material for Protection. Each Party or  
13 Non-Party that designates information or items for protection under this Order must take care to  
14 limit any such designation to specific material that qualifies under the appropriate standards. The  
15 Designating Party must designate for protection only those parts of material, documents, items, or  
16 oral or written communications that qualify – so that other portions of the material, documents,  
17 items, or communications for which protection is not warranted are not swept unjustifiably within  
18 the ambit of this Order.

19 Mass, indiscriminate, or routinized designations are prohibited. Designations that are  
20 shown to be clearly unjustified or that have been made for an improper purpose (e.g., to  
21 unnecessarily encumber or retard the case development process or to impose unnecessary  
22 expenses and burdens on other parties) expose the Designating Party to sanctions.

23 If it comes to a Designating Party's attention that information or items that it designated for  
24 protection do not qualify for protection, that Designating Party must promptly notify all other  
25 Parties that it is withdrawing the mistaken designation.

26 5.2 Manner and Timing of 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 Disclosure or Discovery Material that qualifies for protection under this Order must be clearly so

1 designated before the material is disclosed or produced.

2 Designation in conformity with this Order requires:

3 (a) for information in documentary form (e.g., paper or electronic documents, but  
4 excluding transcripts of depositions or other pretrial or trial proceedings), that the  
5 Producing Party affix the legend “CONFIDENTIAL” to each page that contains protected  
6 material. If only a portion or portions of the material on a page qualifies for protection, the  
7 Producing Party also must clearly identify the protected portion(s) (e.g., by making  
8 appropriate markings in the margins).

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

20 (b) for testimony given in deposition or in other pretrial or trial proceedings, that  
21 the Designating Party identify on the record, before the close of the deposition, hearing, or  
22 other proceeding, all protected testimony.

23 (c) for information produced in some form other than documentary and for any  
24 other tangible items, that the Producing Party affix in a prominent place on the exterior of  
25 the container or containers in which the information or item is stored the legend  
26 “CONFIDENTIAL.” If only a portion or portions of the information or item warrant  
27 protection, the Producing Party, to the extent practicable, shall identify the protected  
28 portion(s).

1           5.3    Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to  
2 designate qualified information or items does not, standing alone, waive the Designating Party's  
3 right to secure protection under this Order for such material. Upon timely correction of a  
4 designation, the Receiving Party must make reasonable efforts to assure that the material is treated  
5 in accordance with the provisions of this Order.

6    **6.        CHALLENGING CONFIDENTIALITY DESIGNATIONS**

7           6.1    Timing of Challenges. Any Party or Non-Party may challenge a designation of  
8 confidentiality at any time. Unless a prompt challenge to a Designating Party's confidentiality  
9 designation is necessary to avoid foreseeable, substantial unfairness, unnecessary economic  
10 burdens, or a significant disruption or delay of the litigation, a Party does not waive its right to  
11 challenge a confidentiality designation by electing not to mount a challenge promptly after the  
12 original designation is disclosed.

13          6.2    Meet and Confer. The Challenging Party shall initiate the dispute resolution process  
14 by providing written notice of each designation it is challenging and describing the basis for each  
15 challenge. To avoid ambiguity as to whether a challenge has been made, the written notice must  
16 recite that the challenge to confidentiality is being made in accordance with this specific paragraph  
17 of the Protective Order. The parties shall attempt to resolve each challenge in good faith and must  
18 begin the process by conferring directly (in voice to voice dialogue; other forms of communication  
19 are not sufficient) within 14 days of the date of service of notice. In conferring, the Challenging  
20 Party must explain the basis for its belief that the confidentiality designation was not proper and  
21 must give the Designating Party an opportunity to review the designated material, to reconsider  
22 the circumstances, and, if no change in designation is offered, to explain the basis for the chosen  
23 designation. A Challenging Party may proceed to the next stage of the challenge process only if it  
24 has engaged in this meet and confer process first or establishes that the Designating Party is  
25 unwilling to participate in the meet and confer process in a timely manner.

26          6.3    Judicial Intervention.

27                If the parties cannot meet in person, the parties shall first meet and confer to try to resolve  
28 their disagreements. The meet and confer session must be *in person or by telephone*, and may not

1 be conducted by letter, e-mail, or fax. If disagreements remain, the parties shall file a joint letter  
2 no later than five business days after the meet and confer session, unless otherwise directed by the  
3 court. **Lead trial counsel for both parties must sign the letter**, which shall include an attestation  
4 that the parties met and conferred in person or by telephone regarding all issues prior to filing the  
5 letter. Going issue-by-issue, the joint letter shall describe each unresolved issue, summarize each  
6 party's position with appropriate legal authority; and provide each party's final proposed  
7 compromise before moving to the next issue. The joint letter shall not exceed ten pages without  
8 leave of court. Parties are expected to plan for and cooperate in preparing the joint letter so that  
9 each side has adequate time to address the arguments. In the rare instance that a joint letter is not  
10 possible, each side may submit a letter not to exceed four pages, which shall include an  
11 explanation of why a joint letter was not possible. The parties shall submit one exhibit to the letter  
12 that only sets forth each disputed discovery request in full, followed immediately by the objections  
13 and/or responses thereto. No other information shall be included in any such exhibit. No other  
14 exhibits shall be submitted without prior approval by the court. The court will review the  
15 submission(s) and determine whether formal briefing or proceedings are necessary. Discovery  
16 letter briefs must be e-filed under the Civil Events category of Motions and Related Filings >  
17 Motions - General > "Discovery Letter Brief". In the event that a discovery hearing is ordered,  
18 counsel will appear *in person*.

## 19 **7. ACCESS TO AND USE OF PROTECTED MATERIAL**

20 7.1 Basic Principles. A Receiving Party may use Protected Material that is disclosed or  
21 produced by another Party or by a Non-Party in connection with this case only for prosecuting,  
22 defending, or attempting to settle this litigation. Such Protected Material may be disclosed only to  
23 the categories of persons and under the conditions described in this Order. When the litigation has  
24 been terminated, a Receiving Party must comply with the provisions of section 13 below (FINAL  
25 DISPOSITION).

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

28 7.2 Disclosure of "CONFIDENTIAL" Information or Items. Unless otherwise ordered

1 by the court or permitted in writing by the Designating Party, a Receiving Party may disclose any  
2 information or item designated “CONFIDENTIAL” only to:

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

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

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

13 (d) the court and its personnel;

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

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

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

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

27 If a Party is served with a subpoena or a court order issued in other litigation that compels  
28 disclosure of any information or items designated in this action as “CONFIDENTIAL,” that Party

1 must:

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

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

7 (c) cooperate with respect to all reasonable procedures sought to be pursued by the  
8 Designating Party whose Protected Material may be affected.

9 If the Designating Party timely seeks a protective order, the Party served with the subpoena  
10 or court order shall not produce any information designated in this action as “CONFIDENTIAL”  
11 before a determination by the court from which the subpoena or order issued, unless the Party has  
12 obtained the Designating Party’s permission. The Designating Party shall bear the burden and  
13 expense of seeking protection in that court of its confidential material – and nothing in these  
14 provisions should be construed as authorizing or encouraging a Receiving Party in this action to  
15 disobey a lawful directive from another court.

16 **9. A NON-PARTY’S PROTECTED MATERIAL SOUGHT TO BE PRODUCED IN**  
17 **THIS LITIGATION**

18 (a) The terms of this Order are applicable to information produced by a Non-Party in this  
19 action and designated as “CONFIDENTIAL.” Such information produced by Non-Parties in  
20 connection with this litigation is protected by the remedies and relief provided by this Order.  
21 Nothing in these provisions should be construed as prohibiting a Non-Party from seeking  
22 additional protections.

23 (b) In the event that a Party is required, by a valid discovery request, to produce a Non-  
24 Party’s confidential information in its possession, and the Party is subject to an agreement with the  
25 Non-Party not to produce the Non-Party’s confidential information, then the Party shall:

26 (1) promptly notify in writing the Requesting Party and the Non-Party that some or  
27 all of the information requested is subject to a confidentiality agreement with a Non-Party;

28 (2) promptly provide the Non-Party with a copy of the Stipulated Protective Order

1 in this litigation, the relevant discovery request(s), and a reasonably specific description of  
2 the information requested; and

3 (3) make the information requested available for inspection by the Non-Party.

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

11 **10. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL**

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

19 **11. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE**  
20 **PROTECTED MATERIAL**

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

1 court.

2 **12. MISCELLANEOUS**

3 12.1 Right to Further Relief. Nothing in this Order abridges the right of any person to  
4 seek its modification by the court in the future.

5 12.2 Right to Assert Other Objections. By stipulating to the entry of this Protective Order  
6 no Party waives any right it otherwise would have to object to disclosing or producing any  
7 information or item on any ground not addressed in this Stipulated Protective Order. Similarly, no  
8 Party waives any right to object on any ground to use in evidence of any of the material covered  
9 by this Protective Order.

10 12.3 Filing Protected Material. Without written permission from the Designating Party or  
11 a court order secured after appropriate notice to all interested persons, a Party may not file in the  
12 public record in this action any Protected Material. A Party that seeks to file under seal any  
13 Protected Material must comply with Civil Local Rule 79-5 and General Order 62. Protected  
14 Material may only be filed under seal pursuant to a court order authorizing the sealing of the  
15 specific Protected Material at issue. Pursuant to Civil Local Rule 79-5 and General Order 62, a  
16 sealing order will issue only upon a request establishing that the Protected Material at issue is  
17 privileged, protectable as a trade secret, or otherwise entitled to protection under the law. If a  
18 Receiving Party's request to file Protected Material under seal pursuant to Civil Local Rule 79-5(d)  
19 and General Order 62 is denied by the court, then the Receiving Party may file the information in  
20 the public record pursuant to Civil Local Rule 79-5(e) unless otherwise instructed by the court.

21 **13. FINAL DISPOSITION**

22 Within 60 days after the final disposition of this action, as defined in paragraph 4, each  
23 Receiving Party must return all Protected Material to the Producing Party or destroy such material.  
24 As used in this subdivision, "all Protected Material" includes all copies, abstracts, compilations,  
25 summaries, and any other format reproducing or capturing any of the Protected Material. Whether  
26 the Protected Material is returned or destroyed, the Receiving Party must submit a written  
27 certification to the Producing Party (and, if not the same person or entity, to the Designating Party)  
28 by the 60 day deadline that (1) identifies (by category, where appropriate) all the Protected

1 Material that was returned or destroyed and (2)affirms that the Receiving Party has not retained  
2 any copies, abstracts, compilations, summaries or any other format reproducing or capturing any  
3 of the Protected Material. Notwithstanding this provision, Counsel are entitled to retain an archival  
4 copy of all pleadings, motion papers, trial, deposition, and hearing transcripts, legal memoranda,  
5 correspondence, deposition and trial exhibits, expert reports, attorney work product, and  
6 consultant and expert work product, even if such materials contain Protected Material. Any such  
7 archival copies that contain or constitute Protected Material remain subject to this Protective Order  
8 as set forth in Section 4 (DURATION).

9  
10 **IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.**

11  
12 Dated: August 8, 2013

**DAVIS, COWELL & BOWE, LLP**

*I attest that concurrence in the filing of  
this document has been obtained from  
each of the other signatories indicated  
by a /s/.*

By: /s/ Sarah Grossman-Swenson  
Sarah Grossman-Swenson  
John J. Davis, Jr.  
*Attorneys for Plaintiffs*

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19  
20 Dated: August 8, 2013

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1 Dated: August 8, 2013  
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23 Dated: August 8, 2013  
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33 *Attorneys for Defendant Homesite, Inc.*

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1 PURSUANT TO STIPULATION, IT IS SO ORDERED.

2  
3 DATED: August 14, 2013



4 The Honorable Donna M. Ryu  
5 United States Magistrate Judge

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1 **EXHIBIT A**

2 **ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND**

3 I, \_\_\_\_\_ [print or type full name], of \_\_\_\_\_  
4 [print or type full address], declare under penalty of perjury that I have read in its entirety and  
5 understand the Stipulated Protective Order that was issued by the United States District Court for the  
6 Northern District of California on \_\_\_\_\_ [date] in the case of Trustees of the Northern California  
7 Tile Industry Pension Trust Fund, et al. v. Peacock Tile & Marble, et al., Case No. CV 11-3859 DMR.

8 I agree to comply with and to be bound by all the terms of this Stipulated Protective Order and I  
9 understand and acknowledge that failure to so comply could expose me to sanctions and punishment in  
10 the nature of contempt. I solemnly promise that I will not disclose in any manner any information or  
11 item that is subject to this Stipulated Protective Order to any person or entity except in strict  
12 compliance with the provisions of this Order.

13 I further agree to submit to the jurisdiction of the United States District Court for the Northern  
14 District of California for the purpose of enforcing the terms of this Stipulated Protective Order, even if  
15 such enforcement proceedings occur after termination of this action.

16  
17 I hereby appoint \_\_\_\_\_ [print or type full name] of  
18 \_\_\_\_\_ [print or type full address and telephone number] as  
19 my California agent for service of process in connection with this action or any proceedings related to  
20 enforcement of this Stipulated Protective Order.

21  
22 Date: \_\_\_\_\_

23 City and State where sworn and signed: \_\_\_\_\_

24  
25 Printed name: \_\_\_\_\_

26  
27 Signature: \_\_\_\_\_