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18 **UNITED STATES DISTRICT COURT**  
 19 **NORTHERN DISTRICT OF CALIFORNIA**  
 20 **OAKLAND DIVISION**

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JEFF YOUNG, individually and on  
behalf of all others similarly situated,  
  
Plaintiff,  
  
v.  
CREE, Inc.,  
  
Defendant.

Case No. 4:17-cv-06252-YGR  
Hon. Yvonne Gonzalez Rogers  
  
~~PROPOSED~~ PROTECTIVE  
ORDER

1 Pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, good cause  
2 having been shown, the following Protective Order (the “Order”) is hereby entered  
3 to facilitate and expedite discovery in this action.

4 Disclosure and discovery activity in this action are likely to involve  
5 production of confidential, proprietary, or private information for which special  
6 protection from public disclosure may be warranted. The parties acknowledge that  
7 this Order does not confer blanket protections on all disclosures or responses to  
8 discovery and that the protection it affords from public disclosure and use extends  
9 only to the limited information or items that are entitled to confidential treatment  
10 under the applicable legal principles. The parties further acknowledge that Civil  
11 Local Rule 79-5 sets forth the procedures that must be followed and the standards  
12 that will be applied when a party seeks permission from the court to file material  
13 under seal.

14 IT IS HEREBY ORDERED that Plaintiff, Defendant, and any person  
15 subject to this Order shall adhere to the following terms:

16 1. **Definition of Protected Material.** “Protected Material” means all  
17 documents, tangible items, testimony, written discovery responses, and  
18 information that have been properly designated by any party or non-party as  
19 “CONFIDENTIAL” or “ATTORNEYS’ EYES ONLY” pursuant to this Order.  
20 Such information produced by non-parties in connection with this litigation is also  
21 protected by the remedies and relief provided by this Order. Nothing in these  
22 provisions should be construed as prohibiting a non-party from seeking additional  
23 protections.

24 2. **Criteria for Designation.** A party or non-party may designate  
25 material as “CONFIDENTIAL” or “ATTORNEYS’ EYES ONLY” only in  
26 accordance with the following procedures:

27 (a) **“CONFIDENTIAL” Material.** A party or non-party (the  
28 “Designating Party”) may designate documents, tangible items, testimony, or other

1 information (collectively, “material”) as “CONFIDENTIAL” if the party or non-  
2 party reasonably believes that the material contains a trade secret or other  
3 proprietary or confidential business, technical, sales, marketing, financial or other  
4 commercial information.

5 (b) **“ATTORNEYS’ EYES ONLY” Material.** The Designating  
6 Party may designate documents, tangible items, testimony, or other information  
7 (collectively, “material”) as “ATTORNEYS’ EYES ONLY” if the party or non-  
8 party reasonably believes that the material (i) qualifies as “CONFIDENTIAL” as  
9 defined above; and (ii) the confidentiality of such material cannot be adequately  
10 maintained so as to protect the reasonable interests of the Designating Party unless  
11 the disclosure of the material is limited to the persons to whom “ATTORNEYS’  
12 EYES ONLY” material may be disclosed pursuant to this Order.

13 **3. Manner of Designation.**

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

23 Mass, indiscriminate, or routinized designations are prohibited. Designations  
24 that are shown to be clearly unjustified or that have been made for an improper  
25 purpose (e.g., to unnecessarily encumber or retard the case development process or  
26 to impose unnecessary expenses and burdens on other parties) expose the  
27 Designating Party to court remedies.

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

5 The Designating Party shall designate Protected Material in the following  
6 manner:

7 (a) For information in documentary form (e.g., paper or electronic  
8 documents, but excluding transcripts of depositions or other pretrial or trial  
9 proceedings), by placing the notation “CONFIDENTIAL” or “ATTORNEYS’  
10 EYES ONLY” on each page of such document. If only a portion or portions of the  
11 material on a page qualifies for protection, the Designating Party also must clearly  
12 identify the protected portion(s) (e.g., by making appropriate markings) and must  
13 specify, for each portion, the level of protection being asserted;

14 (b) For information produced in some form other than documentary and  
15 for any other tangible items, by placing the notation “CONFIDENTIAL” or  
16 “ATTORNEYS’ EYES ONLY” on the item, or if such is not practicable, as  
17 otherwise agreed by the parties. If only a portion or portions of the information or  
18 item warrant protection, the Producing Party, to the extent practicable, shall  
19 identify the protected portion(s) and specify the level of protection being asserted.;

20 (c) For testimony given in deposition or in other pretrial or trial  
21 proceedings, by (i) designating such testimony as “CONFIDENTIAL” or  
22 “ATTORNEYS’ EYES ONLY” within the time periods allowed pursuant to  
23 paragraph 4(c) of this Order; and (ii) requesting that the court reporter place the  
24 notation “CONFIDENTIAL” or “ATTORNEYS’ EYES ONLY” on each page of  
25 the transcript so designated, which designated pages of the transcript shall be  
26 separately bound and conspicuously marked on its cover; any testimony taken by  
27 the parties during which Protected Material is being disclosed shall be taken as if  
28 in camera without any persons in attendance other than the persons listed in

1 Paragraph 6 below, except that the parties may by unanimous consent agree that  
2 additional persons may attend; and

3 (d) For declarations, affidavits, written discovery responses, court filings  
4 or pleadings, by placing the notation “CONFIDENTIAL” or “ATTORNEYS’  
5 EYES ONLY” on the face of such document.

6 **4. Time of Designation.** Unless otherwise agreed, the designation of any  
7 material as “CONFIDENTIAL” or “ATTORNEYS’ EYES ONLY” shall be made  
8 at the following times:

9 (a) For documents, at the time of the production of documents;

10 (b) For declarations, affidavits, written discovery responses, and  
11 pleadings, at the time of the service or filing, whichever occurs first; and

12 (c) For testimony, either (i) at the time that such testimony is given, or (ii)  
13 within thirty (30) days after the receipt of the transcript of such testimony by the  
14 Designating Party; and

15 (d) For documents received from a third-party in response to a subpoena,  
16 within thirty (30) days after the receipt of such documents by the Designating  
17 Party.

18 **5. Resolution of Disputes Regarding Designation.** If a party receiving  
19 Protected Material (the “Receiving Party”) believes that any information is  
20 improperly designated, as provided in this Order, it may, at any time, contest such  
21 designation by sending written notice to the Designating Party. Receiving Party  
22 does not waive its right to challenge a confidentiality designation by electing not to  
23 mount a challenge promptly after the original designation is disclosed. The parties  
24 shall attempt to resolve each challenge in good faith and must confer directly (in  
25 voice to voice dialogue; relying solely on other forms of communication is not  
26 sufficient) within 14 days of the date of notice. In conferring, the challenging party  
27 must explain the basis for its belief that the confidentiality designation was not  
28 proper and must give the Designating Party an opportunity to review the

1 designated material, to reconsider the circumstances, and, if no change in  
2 designation is offered, to explain the basis for the chosen designation. If the parties  
3 cannot in good faith resolve the dispute, the parties will submit a joint letter brief  
4 that addresses their positions on removing or changing the designation; provided,  
5 however, that the Designating Party shall have the burden of proving that such  
6 particular Protected Material is properly designated. Protected Material that is  
7 subject to a dispute shall be treated as originally designated until the parties agree  
8 or the Court orders otherwise. In addition, the parties may submit a joint letter brief  
9 addressing their respective positions on a confidentiality designation at any time if  
10 there is good cause for doing so, including a challenge to the designation of a  
11 deposition transcript or any portions thereof. Any joint letter brief brought pursuant  
12 to this provision must be accompanied by a competent declaration affirming that  
13 the parties have complied with the meet and confer requirements imposed.

14 **6. Persons to Whom Protected Material May Be Disclosed.**

15 (a) **Disclosure of “CONFIDENTIAL” Material.** Material designated as  
16 “CONFIDENTIAL” may be disclosed, and copies may be provided, only to the  
17 following:

- 18 i. The parties to this action;
- 19 ii. The parties’ outside counsel of record and such counsel’s  
20 support staff, legal assistants, and clerical personnel (collectively, “Outside  
21 Counsel”);
- 22 iii. Any expert witness or consultant (collectively, “Expert”)  
23 retained by a party or its respective attorneys in connection with this action, but  
24 only after such person has been provided with a copy of this Order and has  
25 acknowledged his or her willingness to abide by the Order by executing the  
26 attached Confidentiality Agreement;
- 27 iv. Any witness who may testify at a deposition or trial in this  
28 action with respect to Confidential Material, but only after such person has been

1 provided with a copy of this Order and has acknowledged his or her willingness to  
2 abide by the Order by executing the attached Confidentiality Agreement;

3 v. Any non-party support services including, but not limited to,  
4 outside copying services, court reporting services, court reporters, and  
5 videographers as may be reasonably necessary in connection with the preparation  
6 or conduct of this action; and

7 vi. The Court and its personnel and any mediator or arbitrator  
8 having jurisdiction over this action.

9 vii. the author or recipient of a document containing the  
10 information or a custodian or other person who otherwise possessed or knew the  
11 information.

12 (b) **Disclosure of “ATTORNEYS’ EYES ONLY” Material.** Material  
13 designated as “ATTORNEYS’ EYES ONLY” may be disclosed, and copies may  
14 be provided, only to the following:

15 i. The parties’ outside counsel of record and such counsel’s  
16 support staff, legal assistants, and clerical personnel (collectively, “Outside  
17 Counsel”);

18 ii. Any expert witness or consultant (collectively, “Expert”)  
19 retained by a party or its respective attorneys in connection with this action;

20 iii. Any non-party support services including, but not limited to,  
21 outside copying services, court reporting services, court reporters, and  
22 videographers as may be reasonably necessary in connection with the preparation  
23 or conduct of this action; and

24 iv. The Court and its personnel and any mediator or arbitrator  
25 having jurisdiction over this action.

26 v. the author or recipient of a document containing the  
27 information or a custodian or other person who otherwise possessed or knew the  
28 information.





1 action, each party shall, at its option, either return to the Designating Party or  
2 destroy all Protected Material received from the Designating Party, and shall  
3 destroy in whatever form stored or reproduced all work product and any other  
4 documents or tangible things that contain or refer to Protected Material. Outside  
5 Counsel for any party or non-party properly receiving Protected Material shall  
6 provide written certification of compliance with this provision to counsel for the  
7 Designating Party within ninety (90) days after the entry of a final non-appealable  
8 judgment or order concluding this action or the complete settlement of all claims  
9 asserted against all parties to this action. Counsel of record may retain one set of  
10 all papers filed with the Court, including any Protected Material filed under seal  
11 and need not destroy any work product containing any Protected Material.  
12 Protected Material used as exhibits in hearings or other aspects of this matter may  
13 be resealed at the request of either party.

14 **11. Inadvertent Disclosure of Protected Material.** Inadvertent failure to  
15 identify documents or items as “CONFIDENTIAL” or “ATTORNEYS’ EYES  
16 ONLY” information pursuant to the terms of this Order shall not constitute a  
17 waiver of any otherwise valid claim for protection, so long as such claim is  
18 asserted within thirty (30) days of the discovery of the inadvertent disclosure. At  
19 such time, arrangements shall be made for the Designating Party to appropriately  
20 mark the information in accordance with the terms of this Order. The Receiving  
21 Party shall have no liability, under this Order or otherwise, for any disclosure of  
22 information contained in documents or items not bearing a confidentiality legend  
23 occurring before the Receiving Party was placed on notice of the Designating  
24 Party’s claims of confidentiality.

25 **12. Inadvertent Disclosure of Work Produce or Privileged Information.**  
26 When a Producing Party gives notice to Receiving Parties that certain inadvertently  
27 produced material is subject to a claim of privilege or other protection, the  
28 obligations of the Receiving Parties are those set forth in Federal Rule of Civil

1 Procedure 26(b)(5)(B). If, after conferring, the parties are unable to reach a  
2 satisfactory agreement, the Producing Party may file a motion regarding the matter,  
3 but must do so within ten (10) business days after conferring with the Receiving  
4 Party. The Receiving Party shall not disclose to any person the document or thing  
5 for which the belated claim of immunity or privilege is being made, other than  
6 those persons who have had it in their possession prior to receipt of notification  
7 from the Producing Party, until ten (10) business days after receipt of the  
8 notification or, if a motion seeking the return of the inadvertently disclosed  
9 documents or information is filed with the Court, until the disposition of any such  
10 motion.

11 **13.Subpoena of “CONFIDENTIAL” or “ATTORNEYS’ EYES ONLY”**  
12 **Information.** If any individual or entity subpoenas, orders production, or requests  
13 discovery of Protected Material that a Receiving Party has obtained subject to this  
14 Order, the Receiving Party shall promptly notify the Designating Party of same and  
15 shall not produce the Protected Material until the Designating Party has had  
16 reasonable time (at least ten (10) business days) to object or take other appropriate  
17 steps. If the Designating Party timely seeks a protective order, the Party served  
18 with the subpoena or court order shall not produce any information designated in  
19 this action as “CONFIDENTIAL” or “ATTORNEYS’ EYES ONLY” before a  
20 determination by the court from which the subpoena or order issued, unless the  
21 Party has obtained the Designating Party’s permission. The Designating Party shall  
22 bear the burden and expense of seeking protection in that court of its confidential  
23 material – and nothing in these provisions should be construed as authorizing or  
24 encouraging a Receiving Party in this action to disobey a lawful directive from  
25 another court.

26 **14.Duty to Report.** When any attorney of record in this action becomes aware  
27 of any disclosure of Protected Material to any person or in any circumstance not  
28 authorized under this Protective Order, such attorney shall promptly report any

1 such violation to Outside Counsel for the Designating Party, use its best efforts to  
2 retrieve all unauthorized copies of the Protected Material, inform the person or  
3 persons to whom unauthorized disclosures were made of all the terms of this  
4 Protective Order, and request such person or persons to execute the attached  
5 Exhibit A attached hereto.

6 **15.Continuing Jurisdiction.** After the conclusion of the above-captioned  
7 action, the provisions of this Order shall continue to be binding until further order  
8 of this Court, and this Court shall retain jurisdiction over the parties and any other  
9 person who has had access to Protected Material pursuant to this Order, in order to  
10 enforce the provisions of this Order.

11 **16.Limitations of Order.** The restrictions set forth in any of the preceding  
12 paragraphs shall not apply to material that:

13 (a) was, is, or becomes public in a manner other than by violation of this  
14 Order;

15 (b) was already lawfully possessed by the non-designating party before  
16 the disclosure by the Designating Party (except for documents or items in the  
17 possession of the non-designating party that are subject to a confidentiality or non-  
18 disclosure agreement); or

19 (c) was independently developed by the non-designating party by  
20 personnel who did not receive or have access to the Designating Party's Protected  
21 Material.

22 **17.Modification or Amendment of Order.** This Order is without prejudice to  
23 the right of any party to seek modification or amendment of this Order by further  
24 Order of this Court upon motion and notice.

25  
26 IT IS SO ORDERED.

27  
28 DATED this 22<sup>nd</sup> day of January, 2019.

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U.S. Magistrate Judge Thomas S. Hixson