

1 the proposed form of order the court finds unacceptable are as follows:

- 2 1. The order purports to limit use of *all* discovery materials to this action, rather than
3 just “Confidential” discovery materials. Rule 26(c) does not authorize such a
4 limitation for materials that do not warrant protection under that rule.
- 5 2. The order should not enumerate particular kinds of documents that may be designated
6 “Confidential,” but rather should define “Confidential” information as “information
7 (regardless of how generated, stored or maintained) or tangible things that qualify for
8 protection under standards developed under F.R.Civ.P. 26(c).”
- 9 3. The order should distinguish between Producing Parties and Designating Parties (both
10 of which terms should be defined to include non-parties) where appropriate. It is not
11 uncommon for someone other than the producing party to designate information
12 “Confidential.”
- 13 4. As drafted, the provision regarding return or destruction of Confidential materials
14 would appear to apply to the court as well. The court has its own rules regarding
15 retention and destruction of files. *See* CIVIL L.R. 79-1 through 79-5. With respect to
16 confidential documents lodged with chambers, *see* CIVIL L.R. 79-5(e) (“The chambers
17 copy of sealed documents will be disposed of in accordance with the assigned Judge’s
18 discretion. Ordinarily these copies will be recycled, not shredded, unless special
19 arrangements are made”).
- 20 5. The sentence at page 7, lines 12-13 creates a loophole that can lead to disputes
21 regarding whether a party may disregard a designation of “Confidential” without
22 seeking agreement of the Disclosing Party or a court order, simply because it believes
23 the information is already public. The court will not approve inclusion of this
24 sentence in the protective order.
- 25 6. The provision at page 3, lines 14 through 18 provides inappropriately broad relief for
26 inadvertent disclosure of privileged materials. The following language may be used
27 instead:

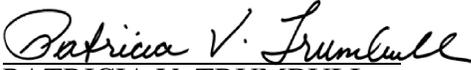
28 “Each party shall make efforts that are ‘reasonably designed’ to protect its privileged materials. *See Gomez v. Vernon*, 255 F.3d 1118, 1131-32 (9th Cir. 2001). What constitutes efforts that are reasonably designed to protect privileged materials depends on the circumstances; the law does not require ‘strenuous or Herculean efforts,’ just ‘reasonable efforts.’ *See, e.g., Hynix Semiconductor, Inc. v. Rambus, Inc.* 2008 WL 350641, *1–*2 (ND Cal., Feb. 2, 2008); *see also*, FED.R.CIV.PRO. 26(f)(3) advisory committee’s notes to 2006 amendments (discussing the substantial costs and delays that can result from attempts to avoid waiving privilege, particularly when discovery of electronic information is involved). When a particular Rule 34 request requires a production or inspection that is too voluminous, expedited or complex (such as certain electronic productions) to allow for an adequate pre-production review, the parties may enter into non-waiver agreements for that particular production. If the requesting party is unwilling to enter into such an agreement, the Producing Party may move the court for a non-waiver order.”

“In the event that, despite reasonable efforts, a Producing Party discovers it has inadvertently produced privileged materials, then within 30 calendar days the Producing party shall notify the Receiving Party that the document(s) or materials should have been withheld on

1 grounds of privilege. After the Receiving Party receives this notice
2 from the Producing Party under this paragraph, the Receiving Party
3 shall not disclose or release the inadvertently produced material to any
4 person or entity pending resolution of the Producing Party's claim of
5 privilege. The parties shall hold a meet and confer, as defined in Civil
6 Local Rule 1-5(n), as soon as reasonably possible after a notice of
7 inadvertent production. If the Producing Party and Receiving Party
8 agree that the inadvertently produced material is privileged, and was
9 disclosed despite efforts by the Producing Party that were 'reasonably
10 designed' to protect the materials, then the Receiving Party shall return
11 or certify the destruction of all copies (including summaries) of such
12 material. If no agreement is reached, then within 10 court days after
13 the meet and confer, the Producing Party must seek a ruling from this
14 court to establish that the material is privileged and that the Producing
15 Party did not waive the privilege by inadvertently producing the
16 material. If the Producing Party seeks such a ruling, the Receiving
17 Party shall not disclose or release the inadvertently produced material
18 to any person or entity pending the court's ruling on the Producing
19 Party's motion."

11 IT IS FURTHER ORDERED that pending entry of the final Protective Order, the provisions
12 of this court's model form of order shall apply to the handling of confidential information in this
13 case.

14 Dated: 10/22/08

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16 PATRICIA V. TRUMBULL
17 United States Magistrate Judge
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