

\*ORDER E-FILED 9/15/2008\*

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11  
 12 UNITED STATES DISTRICT COURT  
 13 NORTHERN DISTRICT OF CALIFORNIA  
 14 SAN JOSE DIVISION

16 SECURITIES AND EXCHANGE )  
 COMMISSION, )

17 Plaintiff, )

18 vs. )

19 KENNETH L. SCHROEDER, )

20 Defendant. )  
 21 )

CASE NO. C 07-3798-JW (HRL)

22 ) **STIPULATION AND ~~PROPOSED~~**  
 ) **ORDER RE MOTION OF KENNETH L.**  
 ) **SCHROEDER TO COMPEL FURTHER**  
 ) **RESPONSES TO DISCOVERY**  
 ) **REQUESTS (TESTIMONY AND**  
 ) **DOCUMENTS) BY (1) KLA-TENCOR**  
 ) **CORPORATION AND (2) SKADDEN,**  
 ) **ARPS, SLATE, MEAGHER & FLOM**  
 ) **LLP, ATTORNEYS FOR THE SPECIAL**  
 ) **COMMITTEE OF KLA'S BOARD OF**  
 ) **DIRECTORS [DKT. NO. 75]**

(MODIFIED BY THE COURT)

24 Date: September 23, 2008

25 Time: 10:00 a.m.

Courtroom: 8

26 Judge: Magistrate Judge Howard R. Lloyd

1           WHEREAS, Defendant Kenneth L. Schroeder (“Schroeder”) issued subpoenas to non-  
2 parties Skadden, Arps, Slate, Meagher & Flom LLP and individual Skadden attorneys Galen  
3 Bellamy, Jack DiCanio, Zvi Gabbay, Elizabeth Harlan, Victoria Holstein-Childress, Cale Keable,  
4 Morgan Lopez, Richard Marmaro, Thomas McDonald, Lanelle Meidan, Jonah Van Zandt and  
5 Sheryl Wu (collectively, "Skadden"), and separately to non-party KLA-Tencor Corporation  
6 ("KLA"); and

7           WHEREAS, Skadden and KLA timely objected to the subpoenas in part on the ground that  
8 they called for the production of documents and information protected from disclosure by the  
9 attorney work product doctrine; and

10           WHEREAS, Skadden, KLA and Schroeder engaged in a "meet and confer" process to  
11 resolve their disputes, but were ultimately unsuccessful; and

12           WHEREAS, on June 9, 2008, Schroeder filed his Motion of Kenneth L. Schroeder to  
13 Compel Further Responses to Discovery Requests (Testimony and Documents) By (1) KLA-  
14 Tencor Corporation and (2) Skadden, Arps, Slate, Meagher & Flom LLP, Attorneys for the Special  
15 Committee of KLA's Board of Directors (the "Motion to Compel") (Dkt. No. 75), originally setting  
16 the Motion to Compel for hearing on July 15, 2008, and later, at the request of KLA and Skadden,  
17 continuing the hearing to August 26, 2008; and

18           WHEREAS, at the request of KLA and Skadden, the parties filed a stipulation dated July  
19 25, 2008 (Dkt. No. 81) setting forth a proposed briefing schedule and continuing the hearing on the  
20 Motion to Compel to September 9, 2008, and, based on the Court's order on that stipulation dated  
21 August 1, 2008 (Dkt. No. 83), a schedule was set for the completion of briefing on the Motion to  
22 Compel and the hearing on the Motion to Compel was continued to September 23, 2008, at 10:00  
23 a.m.; and

24           WHEREAS, on August 1, 2008, Skadden filed its opposition to Schroeder's Motion to  
25 Compel, arguing principally that the documents and information sought in Schroeder's subpoenas  
26 were protected from disclosure by the attorney work product doctrine (Dkt. No. 84, and related  
27 entries); and

28

1           WHEREAS, on August 26, 2008, Schroeder filed his reply brief in support of his Motion to  
2 Compel (the "Schroeder Reply") (Dkt. No. 89) in which he argues, in part, that "the Court need not  
3 even consider any of Skadden's arguments concerning work product protection," citing cases  
4 including *In re California Public Utilities Commission*, 892 F.2d 778, 781 (9th Cir. 1989)  
5 (hereinafter "*CPUC*") (*see* Schroeder's Reply (Dkt. 89) at page 17 line 1 through page 18 line 8);  
6 and

7           WHEREAS, Skadden contends that Schroeder's argument based on *CPUC* and related  
8 cases was not raised by Schroeder in the "meet and confer" process or at any point prior to the  
9 filing of Schroeder's Reply; and

10           WHEREAS, after receiving Schroeder's Reply, Skadden contacted counsel for Schroeder  
11 and requested that Schroeder agree, in light of Schroeder's *CPUC* argument, to continue the  
12 hearing on the Motion to Compel to permit Skadden to move for a protective order prohibiting the  
13 disclosure of documents or information sought in the Motion to Compel that Skadden claims are  
14 protected from disclosure by the attorney work product doctrine; and

15           WHEREAS, Schroeder's counsel explained to Skadden that Schroeder does not wish to  
16 continue the hearing on the Motion to Compel, but would instead agree that Skadden may file a  
17 surreply in further opposition to Schroeder's Motion to Compel, not to exceed five pages, by  
18 Tuesday, September 16, 2008, limited to responding to the arguments raised by Schroeder at page  
19 17 line 1 through page 18 line 8 of Schroeder's Reply (Dkt. No. 89); and

20           WHEREAS, in consideration of Skadden's agreement to proceed by filing a surreply  
21 rather than filing an administrative motion for an order continuing the hearing date, Schroeder has  
22 further agreed that (i) he has not contended, in his Reply or elsewhere, and will not contend that  
23 Skadden's arguments under the attorney work product doctrine in its opposition papers or its  
24 surreply have been compromised or affected in any way by the fact that Skadden did not file a  
25 motion for a protective order, and (ii) to expedite the final resolution of the dispute between  
26 Skadden and Schroeder, if the Court finds that the filing of a motion for protective order by  
27 Skadden or KLA (or both) is appropriate or necessary in light of Schroeder's *CPUC* argument,  
28 Skadden's opposition papers and surreply should be deemed by the Court to constitute a motion for

1 protective order under Rule 26(c) and Rule 45(c) of the Federal Rules of Civil Procedure  
2 prohibiting the disclosure of the documents and information sought in Schroeder's Motion to  
3 Compel that Skadden contends are protected from disclosure by the attorney work product  
4 doctrine; and

5 WHEREAS, to induce Skadden not to file an administrative motion seeking a continuance  
6 of the hearing date, Schroeder and Skadden have further agreed that, if after reviewing the briefs of  
7 the parties, including Skadden's surreply, and after hearing argument on September 23, 2008, the  
8 Court determines that it cannot deny the Motion to Compel or issue a protective order under Rule  
9 26(c) or Rule 45(c) of the Federal Rules of Civil Procedure prohibiting the disclosure of the  
10 documents and information sought in Schroeder's Motion to Compel that Skadden or KLA  
11 contends are protected from disclosure by the attorney work product doctrine without the filing of a  
12 new motion for protective order by Skadden or KLA (or both), then the Court should defer its  
13 ruling on Schroeder's Motion to Compel to permit Skadden and/or KLA to move the court for a  
14 protective order, so that the Court can address the issue with the benefit of full briefing;

15 WHEREAS, to the extent that KLA, in its opposition to Schroeder's Motion to Compel, has  
16 asserted work product objections with respect to certain of the documents and information sought  
17 in Schroeder's separate subpoena to KLA, KLA agrees with and joins Skadden's positions set forth  
18 above;

19 IT IS HEREBY STIPULATED AND AGREED, by and between Schroeder, Skadden and  
20 KLA through their respective counsel, as follows:

21 1. Skadden may file a surreply in further opposition to Schroeder's Motion to  
22 Compel not to exceed five pages, limited to responding to the arguments raised by Schroeder at  
23 page 17 line 1 through page 18 line 8 of Schroeder's Reply (Dkt. No. 89).

24 2. Skadden's surreply shall be filed no later than Tuesday, September 16, 2008.

25 3. The hearing on the Motion to Compel shall go forward as scheduled on  
26 September 23, 2008.

27 4. Skadden's and KLA's objections based on the applicability of the attorney  
28 work product doctrine to the production of documents or information requested in Schroeder's

1 subpoenas shall not be overruled, compromised or affected in any way on the ground that neither  
2 Skadden nor KLA has moved for a protective order.

3           5.       Subject to the discretion and approval of the Court, if the Court determines  
4 that it cannot deny the Motion to Compel or issue a protective order under Rule 26(c) or Rule 45(c)  
5 of the Federal Rules of Civil Procedure prohibiting the disclosure of the documents and  
6 information sought in Schroeder's Motion to Compel that Skadden or KLA contends are protected  
7 from disclosure by the attorney work product doctrine without the filing of a new motion for  
8 protective order by Skadden or KLA (or both), then the Court will defer its ruling on Schroeder's  
9 Motion to Compel to permit Skadden or KLA (or both) to move the court for a protective order, so  
10 that the Court can address the issue with the benefit of full briefing.

11                   IT IS SO STIPULATED.

12  
13 DATED: September 12, 2008

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

14  
15 By: \_\_\_\_\_/s/  
16                   TIMOTHY A. MILLER  
17                   Attorneys for  
18                   Non-Parties Skadden, Arps, Slate, Meagher & Flom LLP  
19                   and Individual Skadden Attorneys

20           I, Timothy A. Miller, am the ECF User whose ID and password are being used to  
21 file this STIPULATION AND [PROPOSED] ORDER RE MOTION OF KENNETH L.  
22 SCHROEDER TO COMPEL FURTHER RESPONSES TO DISCOVERY REQUESTS  
23 (TESTIMONY AND DOCUMENTS) BY (1) KLA-TENCOR CORPORATION AND (2)  
24 SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, ATTORNEYS FOR THE SPECIAL  
25 COMMITTEE OF KLA'S BOARD OF DIRECTORS [DKT. NO. 75]. In compliance with General  
26 Order 45, X.B., I hereby attest that each of the two signatories identified below has concurred in  
27 this filing.  
28

1 DATED: September 12, 2008

DLA PIPER US LLP  
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9 DATED: September 12, 2008

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19 **ORDER**

20 PURSUANT TO STIPULATION, IT IS SO ORDERED. **Skadden's surreply**  
21 **shall be filed no later than 5:00 p.m. on September 16, 2008.**

22 Dated: September 15, 2008

23   
24 \_\_\_\_\_  
The Honorable Howard R. Lloyd  
United States Magistrate Judge