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CYBERDATA CORPORATION; NUMONIX, INC.;
and CONQUEST TECHNOLOGY LIMITED

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

METTEYYA BRAHMANA,

Case No. C 09-00106 RMW

Plaintiff,

~~[PROPOSED]~~ PROTECTIVE ORDER

v.

PHILLIP CHARLES LEMBO; CYBERDATA
CORPORATION; NUMONIX, INC.; and
CONQUEST TECHNOLOGY LIMITED

Defendants.

_____ /

~~The Motion of Defendants Phillip Charles Lembo, CyberData Corporation, and Numonix, Inc. for a Protective order came on for hearing before this Court on _____, 2009. Appearances were as noted on the record. Good cause appearing, Defendants' Motion is GRANTED.~~

The Court hereby enters the following Protective Order:

1. PURPOSES AND LIMITATIONS

Disclosure and discovery activity in this action are likely to involve production of confidential, proprietary, or private information for which special protection from public disclosure and from use for any purpose other than prosecuting this litigation would be warranted. Accordingly, the court enters the following Protective Order. This Order does not confer blanket

1 protections on all disclosures or responses to discovery and the protection it affords extends only to
2 the limited information or items that are entitled under the applicable legal principles to treatment
3 as confidential. As set forth in Section 10, below, this Protective Order creates no entitlement to file
4 confidential information under seal; Civil Local Rule 79-5 sets forth the procedures that must be
5 followed and reflects the standards that will be applied when a party seeks permission from the court
6 to file material under seal.

7 2. DEFINITIONS

8 2.1 Party: any party to this action, including all of its officers, directors,
9 employees, consultants, retained experts, and outside counsel (and their support staff).

10 2.2 Disclosure or Discovery Material: all items or information, regardless of the
11 medium or manner generated, stored, or maintained (including, among other things, testimony,
12 transcripts, or tangible things) that are produced or generated in disclosures or responses to discovery
13 in this matter.

14 2.3 “Confidential” Information or Items: information (regardless of how
15 generated, stored or maintained) or tangible things that qualify for protection under standards
16 developed under F.R.Civ.P. 26(c).

17 2.4 “Highly Confidential - Attorneys’ Eyes Only” Information or Items: extremely
18 sensitive “Confidential Information or Items” whose disclosure to another Party or non-party would
19 create a substantial risk of serious injury that could not be avoided by less restrictive Material in this
20 action.

21 2.5 Receiving Party: a Party that receives Disclosure or Discovery Material from
22 a Producing Party.

23 2.6 Producing Party: a Party or non-party that produces Disclosure or Discovery
24 Material in this action.

25 2.7. Designating Party: a Party or non-party that designates information or items
26 that it produces in disclosures or in responses to discovery as “Confidential” or “Highly Confidential
27 - Attorneys’ Eyes Only.”

28 2.8 Protected Material: any Disclosure or Discovery Material that is designated

1 as “Confidential” or as “Highly Confidential - Attorneys’ Eyes Only.”

2 2.9. Outside Counsel: attorneys who are not employees of a Party but who are
3 retained to represent or advise a Party in this action.

4 2.10 House Counsel: attorneys who are employees of a Party.

5 2.11 Counsel (without qualifier): Outside Counsel and House Counsel (as well as
6 their support staffs).

7 2.12 Expert: a person with specialized knowledge or experience in a matter
8 pertinent to the litigation who has been retained by a Party or its counsel to serve as an expert witness
9 or as a consultant in this action and who is not a past or a current employee of a Party or of a
10 competitor of a Party’s and who, at the time of retention, is not anticipated to become an employee
11 of a Party or a competitor of a Party’s. This definition includes a professional jury or trial consultant
12 retained in connection with this litigation.

13 2.13 Professional Vendors: persons or entities that provide litigation support
14 services (e.g., photocopying; videotaping; translating; preparing exhibits or demonstrations;
15 organizing, storing, retrieving data in any form or medium; etc.) and their employees and
16 subcontractors.

17 3. SCOPE

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

22 4. DURATION

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

26 5. DESIGNATING PROTECTED MATERIAL

27 5.1 Exercise of Restraint and Care in Designating Material for Protection. Each
28 Party or non-party that designates information or items for protection under this Order must take care

1 to limit any such designation to specific material that qualifies under the appropriate standards. A
2 Designating Party must take care to designate for protection only those parts of material, documents,
3 items, or oral or written communications that qualify - so that other portions of the material,
4 documents, items, or communications for which protection is not warranted are not swept
5 unjustifiably within the ambit of this Order.

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

10 If it comes to a Party's or a non-party's attention that information or items that it
11 designated for protection do not qualify for protection at all, or do not qualify for the level of
12 protection initially asserted, that Party or non-party must promptly notify all other parties that it is
13 withdrawing the mistaken designation.

14 5.2 Manner and Timing of Designations. Except as otherwise provided in this
15 Order (see, e.g., second paragraph of section 5.2(a), below), or as otherwise stipulated or ordered,
16 material that qualifies for protection under this Order must be clearly so designated before the
17 material is disclosed or produced.

18 Designation in conformity with this Order requires:

19 (a) for information in documentary form (apart from transcripts of
20 depositions or other pretrial or trial proceedings), that the Producing Party affix the legend
21 "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY" at the top of
22 each page that contains protected material. If only a portion or portions of the material on a page
23 qualifies for protection, the Producing Party also must clearly identify the protected portion(s) (e.g.,
24 by making appropriate markings in the margins) and must specify, for each portion, the level of
25 protection being asserted (either "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL -
26 ATTORNEYS' EYES ONLY").

27 A Party or non-party that makes original documents or materials available for
28 inspection need not designate them for protection until after the inspecting Party has indicated which

1 material it would like copied and produced. During the inspection and before the designation, all
2 of the material made available for inspection shall be deemed “HIGHLY CONFIDENTIAL -
3 ATTORNEYS’ EYES ONLY.” After the inspecting Party has identified the documents it wants
4 copied and produced, the Producing Party must determine which documents, or portions thereof,
5 qualify for protection under this Order, then, before producing the specified documents, the
6 Producing Party must affix the appropriate legend (“CONFIDENTIAL” or “HIGHLY
7 CONFIDENTIAL - ATTORNEYS’ EYES ONLY”) at the top of each page that contains Protected
8 Material. If only a portion or portions of the material on a page qualifies for protection, the
9 Producing Party also must clearly identify the protected portion(s) (e.g., by making appropriate
10 markings in the margins) and must specify, for each portion, the level of protection being asserted
11 (either “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL - ATTORNEYS’ EYES ONLY”).

12 (b) for testimony given in deposition or in other pretrial or trial
13 proceedings, that the Party or non-party offering or sponsoring the testimony identify on the record,
14 before the close of the deposition, hearing, or other proceeding, all protected testimony, and further
15 specify any portions of the testimony that qualify as “HIGHLY CONFIDENTIAL - ATTORNEYS’
16 EYES ONLY.” When it is impractical to identify separately each portion of testimony that is
17 entitled to protection, and when it appears that substantial portions of the testimony may qualify for
18 protection, the Party or non-party that sponsors, offers, or gives the testimony may invoke on the
19 record (before the deposition or proceeding is concluded) a right to have up to 20 days to identify
20 the specific portions of the testimony as to which protection is sought and to specify the level of
21 protection being asserted (“CONFIDENTIAL” or “HIGHLY CONFIDENTIAL - ATTORNEYS’
22 EYES ONLY”). Only those portions of the testimony that are appropriately designated for protection
23 within the 20 days shall be covered by the provisions of this Protective Order. Transcript pages
24 containing Protected Material must be separately bound by the court reporter, who must affix to the
25 top of each such page the legend “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL -
26 ATTORNEYS’ EYES ONLY,” as instructed by the Party or non-party offering or sponsoring the
27 witness or presenting the testimony.

28 (c) for information produced in some form other than documentary, and

1 for any other tangible items, that the Producing Party affix in a prominent place on the exterior of
2 the container or containers in which the information or item is stored the legend "CONFIDENTIAL"
3 or "HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY." If only portions of the
4 information or item warrant protection, the Producing Party, to the extent practicable, shall identify
5 the protected portions, specifying whether they qualify as "Confidential" or as "Highly Confidential
6 - Attorneys' Eyes Only."

7 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure
8 to designate qualified information or items as "Confidential" or "Highly Confidential - Attorneys'
9 Eyes Only" does not, standing alone, waive the Designating Party's right to secure protection under
10 this Order for such material. If material is appropriately designated as "Confidential" or "Highly
11 Confidential - Attorneys' Eyes Only" after the material was initially produced, the Receiving Party,
12 on timely notification of the designation, must make reasonable efforts to assure that the material
13 is treated in accordance with the provisions of this Order.

14 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

15 6.1 Timing of Challenges. Unless a prompt challenge to a Designating Party's
16 confidentiality designation is necessary to avoid foreseeable substantial unfairness, unnecessary
17 economic burdens, or a later significant disruption or delay of the litigation, a Party does not waive
18 its right to challenge a confidentiality designation by electing not to mount a challenge promptly after
19 the original designation is disclosed.

20 6.2 Meet and Confer. A Party that elects to initiate a challenge to a Designating
21 Party's confidentiality designation must do so in good faith and must begin the process by conferring
22 directly (in voice to voice dialogue; other forms of communication are not sufficient) with counsel
23 for the Designating Party. In conferring, the challenging Party must explain the basis for its belief
24 that the confidentiality designation was not proper and must give the Designating Party an
25 opportunity to review the designated material, to reconsider the circumstances, and, if no change in
26 designation is offered, to explain the basis for the chosen designation. A challenging Party may
27 proceed to the next stage of the challenge process only if it has engaged in this meet and confer
28 process first.

1 6.3 Judicial Intervention. A Party that elects to press a challenge to a
2 confidentiality designation after considering the justification offered by the Designating Party may
3 file and serve a motion under Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5, if
4 applicable) that identifies the challenged material and sets forth in detail the basis for the challenge.
5 Each such motion must be accompanied by a competent declaration that affirms that the movant has
6 complied with the meet and confer requirements imposed in the preceding paragraph and that sets
7 forth with specificity the justification for the confidentiality designation that was given by the
8 Designating Party in the meet and confer dialogue.

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

13 7. ACCESS TO AND USE OF PROTECTED MATERIAL

14 7.1 Basic Principles. A Receiving Party may use Protected Material that is disclosed or
15 produced by another Party or by a non-party in connection with this case only for prosecuting,
16 defending, or attempting to settle this litigation. Such Protected Material may be disclosed only to
17 the categories of persons and under the conditions described in this Order. When the litigation has
18 been terminated, a Receiving Party must comply with the provisions of section 11, below (FINAL
19 DISPOSITION).

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

22 7.2 Disclosure of "CONFIDENTIAL" Information or Items. Unless otherwise ordered
23 by the court or permitted in writing by the Designating Party, a Receiving Party may disclose any
24 information or item designated CONFIDENTIAL only to:

25 (a) the Receiving Party's Outside Counsel of record in this action, as well as
26 employees of said Counsel to whom it is reasonably necessary to disclose the information for this
27 litigation and who have signed the "Agreement to Be Bound by Protective Order" that is attached
28 hereto as Exhibit A;

1 (b) the officers, directors, and employees (including House Counsel) of the
2 Receiving Party to whom disclosure is reasonably necessary for this litigation and who have signed
3 the “Agreement to Be Bound by Protective Order” (Exhibit A);

4 (c) experts (as defined in this Order) of the Receiving Party to whom disclosure
5 is reasonably necessary for this litigation and who have signed the “Agreement to Be Bound by
6 Protective Order” (Exhibit A);

7 (d) the Court and its personnel;

8 (e) court reporters, their staffs, and professional vendors to whom disclosure is
9 reasonably necessary for this litigation and who have signed the “Agreement to Be Bound by
10 Protective Order” (Exhibit A);

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

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

17 7.3 Disclosure of “HIGHLY CONFIDENTIAL - ATTORNEYS’ EYES ONLY”
18 Information or Items. Unless otherwise ordered by the court or permitted in writing by the
19 Designating Party, a Receiving Party may disclose any information or item designated “HIGHLY
20 CONFIDENTIAL - ATTORNEYS’ EYES ONLY” only to:

21 (a) the Receiving Party’s Outside Counsel of record in this action, as well as
22 employees of said Counsel to whom it is reasonably necessary to disclose the information for this
23 litigation and who have signed the “Agreement to Be Bound by Protective Order” that is attached
24 hereto as Exhibit A;

25 (b) Experts (as defined in this Order) (1) to whom disclosure is reasonably
26 necessary for this litigation, (2) who have signed the “Agreement to Be Bound by Protective Order”
27 (Exhibit A),; and (3) as to whom the procedures set forth in paragraph 7.4, below, have been
28 followed];

- 1 (c) the Court and its personnel;
- 2 (d) court reporters, their staffs, and professional vendors to whom disclosure is
- 3 reasonably necessary for this litigation and who have signed the “Agreement to Be Bound by
- 4 Protective Order” (Exhibit A); and
- 5 (e) the author of the document or the original source of the information.

6 7.4 Procedures for Approving Disclosure of “HIGHLY CONFIDENTIAL -

7 ATTORNEYS’ EYES ONLY” Information or Items to “Experts”.

8 (a) Unless otherwise ordered by the court or agreed in writing by the Designating

9 Party, a Party that seeks to disclose to an “Expert” (as defined in this Order) any information or item

10 that has been designated “HIGHLY CONFIDENTIAL - ATTORNEYS’ EYES ONLY” first must

11 make a written request to the Designating Party that (1) identifies the specific HIGHLY

12 CONFIDENTIAL information that the Receiving Party seeks permission to disclose to the Expert,

13 (2) sets forth the full name of the Expert and the city and state of his or her primary residence, (3)

14 attaches a copy of the Expert’s current resume, (4) identifies the Expert’s current employer(s), (5)

15 identifies each person or entity from whom the Expert has received compensation for work in his

16 or her areas of expertise or to whom the expert has provided professional services at any time during

17 the preceding five years, and (6) identifies (by name and number of the case, filing date, and location

18 of court) any litigation in connection with which the Expert has provided any professional services

19 during the preceding five years.

20 (b) A Party that makes a request and provides the information specified in the

21 preceding paragraph may disclose the subject Protected Material to the identified Expert unless,

22 within seven court days of delivering the request, the Party receives a written objection from the

23 Designating Party. Any such objection must set forth in detail the grounds on which it is based.

24 (c) A Party that receives a timely written objection must meet and confer with the

25 Designating Party (through direct voice to voice dialogue) to try to resolve the matter by agreement.

26 If no agreement is reached, the Party seeking to make the disclosure to the Expert may file a motion

27 as provided in Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5, if applicable)

28 seeking permission from the court to do so. Any such motion must describe the circumstances with

1 specificity, set forth in detail the reasons for which the disclosure to the Expert is reasonably
2 necessary, assess the risk of harm that the disclosure would entail and suggest any additional means
3 that might be used to reduce that risk. In addition, any such motion must be accompanied by a
4 competent declaration in which the movant describes the parties' efforts to resolve the matter by
5 agreement (i.e., the extent and the content of the meet and confer discussions) and sets forth the
6 reasons advanced by the Designating Party for its refusal to approve the disclosure.

7 In any such proceeding the Party opposing disclosure to the Expert shall bear the
8 burden of proving that the risk of harm that the disclosure would entail (under the safeguards
9 proposed) outweighs the Receiving Party's need to disclose the Protected Material to its Expert.

10 8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN
11 OTHER LITIGATION.

12 If a Receiving Party is served with a subpoena or an order issued in other litigation that would
13 compel disclosure of any information or items designated in this action as "CONFIDENTIAL" or
14 "HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY," the Receiving Party must so notify
15 the Designating Party, in writing (by fax, if possible) immediately and in no event more than three
16 court days after receiving the subpoena or order. Such notification must include a copy of the
17 subpoena or court order.

18 The Receiving Party also must immediately inform in writing the Party who caused the
19 subpoena or order to issue in the other litigation that some or all the material covered by the
20 subpoena or order is the subject of this Protective Order. In addition, the Receiving Party must
21 deliver a copy of this Protective Order promptly to the Party in the other action that caused the
22 subpoena or order to issue.

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

1 9. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

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

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

13 11. FINAL DISPOSITION. Unless otherwise ordered or agreed in writing by the
14 Producing Party, within sixty days after the final termination of this action, each Receiving Party
15 must return all Protected Material to the Producing Party. As used in this subdivision, “all Protected
16 Material” includes all copies, abstracts, compilations, summaries or any other form of reproducing
17 or capturing any of the Protected Material. With permission in writing from the Designating Party,
18 the Receiving Party may destroy some or all of the Protected Material instead of returning it.
19 Whether the Protected Material is returned or destroyed, the Receiving Party must submit a written
20 certification to the Producing Party (and, if not the same person or entity, to the Designating Party)
21 by the sixty day deadline that identifies (by category, where appropriate) all the Protected Material
22 that was returned or destroyed and that affirms that the Receiving Party has not retained any copies,
23 abstracts, compilations, summaries or other forms of reproducing or capturing any of the Protected
24 Material. Notwithstanding this provision, Counsel are entitled to retain an archival copy of all
25 pleadings, motion papers, transcripts, legal memoranda, correspondence or attorney work product,
26 even if such materials contain Protected Material. Any such archival copies that contain or constitute
27 Protected Material remain subject to this Protective Order as set forth in Section 4 (DURATION),
28 above.

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12. MISCELLANEOUS


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

12.2 Right to Assert Other Objections. The entry of this Protective Order does not abridge the rights of any Party it otherwise would have to object to disclosing or producing any information or item on any ground not addressed in this Protective Order. Similarly, no Party waives any right to object on any ground to use in evidence of any of the material covered by this Protective Order.

12.3 CyberData Hard Drive. The hard drive taken by Plaintiff from his CyberData computer shall be treated as "Highly Confidential." Any other software, trade secrets, or proprietary information of any Defendants in the possession of Plaintiff shall also be treated as "Highly Confidential."

IT IS SO ORDERED.

DATED: 8/24, 2009


Judge ~~Ronald M. Whyte~~ Patricia V. Trumbull
United States ~~District~~/Magistrate Judge

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EXHIBIT A

ACKNOWLEDGMENT AND AGREEMENT TO BE 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 Protective Order that was issued by the United States District Court for the Northern District of California on [date] in the case of _____ [insert formal name of the case and the number and initials assigned to it by the court]. I agree to comply with and to be bound by all the terms of this 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 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 Protective Order, even if such enforcement proceedings occur after termination of this action.

I hereby appoint _____ [print or type full name] of _____ [print or type full address and telephone number] 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: _____
[printed name]

Signature: _____
[signature]