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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

WAYNE KOH, Individually And On Behalf Of
All Others Similarly Situated,

Plaintiff,

vs.

SC Johnson & Son, Inc.,

Defendant.

Case No. 09-cv-00927 (RMW)

~~PROPOSED~~ STIPULATED
PROTECTIVE ORDER NO. 1
AS AMENDED BY THE COURT

1 1. PURPOSES AND LIMITATIONS

2 Disclosure and discovery activity in this action are likely to involve production of
3 confidential, proprietary, or private information for which special protection from public
4 disclosure and from use for any purpose other than prosecuting this litigation would be
5 warranted. Accordingly, the parties hereby stipulate to and petition the court to enter the
6 following Stipulated Protective Order. The parties acknowledge that this Order does not confer
7 blanket protections on all disclosures or responses to discovery and that the protection it affords
8 extends only to the information or items that are entitled under the applicable legal principles to
9 treatment as confidential. The parties further acknowledge, as set forth in Section 10 below, that
10 this Stipulated Protective Order creates no entitlement to file confidential information under seal;
11 Civil Local Rule 79-5 sets forth the procedures that must be followed and reflects the standards
12 that will be applied when a party seeks permission from the court to file material under seal.

13 2. DEFINITIONS

14 2.1 Party: any party to this action, including all of its officers, directors,
15 employees, consultants, retained experts, and outside counsel (and their support staff).

16 2.2 Disclosure or Discovery Material: all items or information, regardless of the
17 medium or manner generated, stored, or maintained (including, among other things,
18 testimony, transcripts, or tangible things) that are produced or generated in disclosures or
19 responses to discovery in this matter.

20 2.3 "CONFIDENTIAL" Information or Items: information (regardless of how
21 generated, stored or maintained) or tangible things that qualify for protection under
22 standards developed under F.R.Civ.P.26(c).

23 2.4 "HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY" Information or
24 Items: extremely sensitive "Confidential Information or Items" whose disclosure to
25 another Party or nonparty would create a substantial risk of serious injury that could not
26 be avoided by less restrictive means, including trade secrets, confidential research and
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1 development, or proprietary business information, the disclosure of which might
2 competitively disadvantage the Producing Party.

3 2.5 Receiving Party: a Party that receives Disclosure or Discovery Material from
4 a Producing Party.

5 2.6 Producing Party: a Party or non-party that produces Disclosure or Discovery
6 Material in this action.

7 2.7. Designating Party: a Party or non-party that designates information or items
8 that it produces in disclosures or in responses to discovery as "CONFIDENTIAL" or
9 "HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY."

10 2.8 Protected Material: any Disclosure or Discovery Material that is designated as
11 "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY."

12 2.9. Outside Counsel: attorneys who are not employees of a Party but who are
13 retained to represent or advise a Party in this action.

14 2.10 House Counsel: attorneys who are employees of a Party.

15 2.11 Counsel (without qualifier): Outside Counsel and House Counsel (as well as
16 their support staffs).

17 2.12 Expert: a person with specialized knowledge or experience in a matter
18 pertinent to the litigation who has been retained by a Party or its counsel to serve as an
19 expert witness or as a consultant in this action, and who is not a past or a current
20 employee of a Party or of a competitor of a Party, and who, at the time of retention, is not
21 anticipated to become an employee of a Party or competitor of a Party. This definition
22 includes a professional jury or trial consultant retained in connection with this litigation.

23 2.13 Professional Vendors: persons or entities that provide litigation support
24 services (e.g., photocopying; videotaping; translating; preparing exhibits or
25 demonstrations; organizing, storing, retrieving data in any form or medium; etc.) and
26 their employees and subcontractors.

1 3. SCOPE

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

7 4. DURATION

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

11 5. DESIGNATING PROTECTED MATERIAL

12 5.1 Exercise of Restraint and Care in Designating Material for Protection. Each
13 Party or non-party that designates information or items for protection under this Order
14 must, to the extent feasible, take care to limit any such designation to specific material
15 that qualifies under the appropriate standards. ~~Notwithstanding the above, a Designating~~
16 ~~Party may designate a document in its entirety as Protected Material even though only~~
17 ~~portions of the document may qualify.~~ **A Designating Party must take care to designate**
18 **for protection only those parts of material, documents, items, or oral or written**
19 **communications that qualify, so that other portions of the material, documents, items, or**
20 **communications for which protection is not warranted are not swept unjustifiably within**
21 **the ambit of this Order.** If it comes to a Designating Party's attention that information or items
22 that it designated for protection do not qualify for protection at all, or do not qualify for the level
23 of protection initially asserted, that Designating Party must, within a reasonable time, notify all
24 other parties that it is withdrawing the mistaken designation.

25 5.2 Manner and Timing of Designations. Except as otherwise provided in this
26 Order (see, e.g., second paragraph of section 5.2(a), below), or as otherwise stipulated or
27 ordered, material that qualifies for protection under this Order must be clearly so
28 designated before the material is disclosed or produced. Designation in conformity with
this Order requires:

1 (a) for information in documentary form (apart from transcripts of depositions or other
2 pretrial or trial proceedings), that the Producing Party affix the legend "CONFIDENTIAL" or
3 "HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY" on each page that contains
4 protected material. **If only a portion or portions of the material on a page qualifies for
5 protection, the Producing Party also must clearly identify the protected portion(s) (e.g.,
6 by making appropriate markings in the margins) and must specify, for each portion, the
7 level of protection being asserted.**

8 A Party or non-party that makes original documents or materials available for
9 inspection need not designate them for protection until after the inspecting Party has
10 indicated which material it would like copied and produced. During the inspection and
11 before the designation, all of the material made available for inspection shall be deemed
12 "HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY." After the inspecting Party
13 has identified the documents it wants copied and produced, the Producing Party must
14 determine which documents, **or portions thereof**, qualify for protection under this Order, then,
15 before producing copies of the specified documents, the Producing Party must affix to the copies
16 the appropriate legend ("CONFIDENTIAL" or "HIGHLY CONFIDENTIAL-ATTORNEYS'
17 EYES ONLY") on each page that contains Protected Material. **If only a portion or portions of
18 the material on a page qualifies for protection, the Producing Party also must clearly
19 identify the protected portions and must specify, for each portion, the level of protection
20 being asserted.**

21 (b) for testimony given in deposition or in other pretrial or trial proceedings, that
22 the Party or non-party offering or sponsoring the testimony shall invoke on the record
23 (before the deposition or proceeding is concluded) a right to have up to 14 days after
24 receipt of the transcript to identify the specific portions of the testimony as to which
25 protection is sought and to specify the level of protection being asserted
26 ("CONFIDENTIAL" or "HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY").
27 Until the expiration of the 14 days after receipt of the transcript or upon the designation
28 or notice that no designation will be made, whichever comes first, the testimony shall be
maintained as "HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY." Only those
portions of the testimony that are appropriately designated for protection within the 14
days shall be covered by the provisions of this Stipulated Protective Order.

Transcript pages containing Protected Material must be separately bound by the
court reporter, who must affix to the top of each such page the legend

1 "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY," as
2 instructed by the Party or nonparty offering or sponsoring the witness or presenting the
3 testimony.

4 (c) for information produced in some form other than documentary, and for any
5 other tangible items, that the Producing Party affix in a prominent place on the exterior of
6 the container or containers in which the information or item is stored the legend
7 "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY." If
8 only portions of the information or item warrant protection, the Producing Party, to the
9 extent practicable, shall identify the protected portions, specifying whether they qualify
10 as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY."

11 5.3 Inadvertent Failures to Designate. An inadvertent failure to designate qualified
12 information or items as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL-
13 ATTORNEYS' EYES ONLY" does not, standing alone, waive the Designating Party's
14 right to secure protection under this Order for such material. If material is appropriately
15 designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL-ATTORNEYS'
16 EYES ONLY" after the material was initially produced, the Receiving Party, on
17 notification of the designation, must make reasonable efforts to assure that the material is
18 treated in accordance with the provisions of this Order.

19 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

20 6.1 Timing of Challenges. A challenge to a Designating Party's confidentiality
21 designation must be asserted within a reasonable time after the original designation is
22 disclosed.

23 6.2 Meet and Confer. A Party that elects to initiate a challenge to a Designating
24 Party's confidentiality designation must do so in good faith and must begin the process by
25 conferring directly (**in voice-to-voice dialogue; other forms of communication are not**
26 **sufficient**) with counsel for the Designating Party. In conferring, the challenging
27 Party must explain the basis for its belief that the confidentiality designation was not
proper and must give the Designating Party an opportunity to review the designated

1 material, to reconsider the circumstances, and, if no change in designation is offered, to
2 explain the basis for the chosen designation. A challenging Party may proceed to the next
3 stage of the challenge process only if it has engaged in this meet and confer process first.

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

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

15 7. ACCESS TO AND USE OF PROTECTED MATERIAL

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

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

25 7.2 Disclosure of "CONFIDENTIAL" Information or Items. Unless otherwise
26 ordered by the court or permitted in writing by the Designating Party, a Receiving Party
27 may disclose any information or item designated CONFIDENTIAL only to:

- 1 (a) the parties to this action;
- 2 (b) the Receiving Party's Outside Counsel of record in this action, including
3 employees of said Counsel to whom it is reasonably necessary to disclose the information
4 for this litigation;
- 5 (c) the officers, directors, and employees (including House Counsel) of the
6 Receiving Party to whom disclosure is reasonably necessary for this litigation;
- 7 (d) Experts (as defined in this Order) of the Receiving Party to whom disclosure is
8 reasonably necessary for this litigation and who have signed the "Agreement to Be Bound
9 by Protective Order" (Exhibit A);
- 10 (e) the Court and its personnel;
- 11 (f) stenographers, their staffs, and professional vendors to whom disclosure is
12 reasonably necessary for this litigation and who have signed the "Agreement to Be Bound
13 by Protective Order" (Exhibit A);
- 14 (g) witnesses in the action to whom disclosure is reasonably necessary after
15 having been advised of the existence and terms of this Order and having signed the
16 "Agreement to Be Bound By Protective Order" (Exhibit A);
- 17 (h) the author of the document or the original source of the information.

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

- 22 (a) the parties to this action;
- 23 (b) the Receiving Party's Outside Counsel of record in this action, including
24 employees of said Counsel to whom it is reasonably necessary to disclose the information
25 for this litigation;
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1 (c) House Counsel of a Receiving Party (1) who has no involvement in
2 competitive decision-making involving the subject matter of this action, and (2) to whom
3 disclosure is reasonably necessary for this litigation;

4 (d) Experts (as defined in this Order) to whom disclosure is reasonably necessary
5 for this litigation and who have signed the "Agreement to Be Bound by Protective Order"
6 (Exhibit A);

7 (e) the Court and its personnel;

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

11 (g) after obtaining the Disclosing Party's permission, which it will not withhold
12 unreasonably, witnesses in the action to whom disclosure is reasonably necessary after
13 having been advised of the existence and terms of this Order and having signed the
14 "Agreement to Be Bound By Protective Order" (Exhibit A); and

15 (h) the author of the document or the original source of the information.

16 8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN
17 OTHER LITIGATION.

18 If a Receiving Party is served with a subpoena or an order issued in other
19 litigation that would compel disclosure of any information or items designated in this
20 action as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL-ATTORNEYS' EYES
21 ONLY," the Receiving Party must so notify the Designating Party, in writing (by fax or
22 email, if possible) no more than seven court days after receiving the subpoena or order.
23 Such notification must include a copy of the subpoena or court order.

24 The Receiving Party also must inform in writing the Party who caused the
25 subpoena or order to issue in the other litigation that some or all the material covered by
26 the subpoena or order is the subject of this Protective Order. In addition, the Receiving
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1 Party must deliver a copy of this Stipulated Protective Order promptly to the Party in the
2 other action that caused the subpoena or order to issue.

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

10 9. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

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

19 10. FILING PROTECTED MATERIAL

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

24 Where filings are made under seal, the Party filing the document shall lodge with
25 the Court's chambers an unredacted version of the filing.

26 Any Protected Material used openly in court hearings or trial will not be kept
27 confidential absent order of the Court, secured in advance of the use of such material.

1 11. FINAL DISPOSITION

2 Unless otherwise ordered or agreed in writing by the Producing Party, within
3 sixty days after the final termination of this action, each Receiving Party must undertake
4 its best efforts to locate and return all Protected Material to the Producing Party. The
5 “final termination” shall occur when the time for appeal or review of a final judgment
6 expires or, if any appeal is filed and not dismissed, five (5) business days after the final
7 judgment is upheld on appeal in all material respects and is no longer subject to review
8 upon appeal or by writ of certiorari. As used in this subdivision, "all Protected Material"
9 includes all copies, abstracts, compilations, summaries or any other form of reproducing
10 or capturing any of the Protected Material. With permission in writing from the
11 Designating Party, the Receiving Party may destroy some or all of the Protected Material
12 instead of returning it.

13 Whether the Protected Material is returned or destroyed, the Receiving Party must
14 submit a written certification to the Producing Party (and, if not the same person or
15 entity, to the Designating Party) by the sixty-day deadline that identifies (by category,
16 where appropriate) all the Protected Material that was returned or destroyed and that
17 affirms that the Receiving Party has not knowingly retained any copies, abstracts,
18 compilations, summaries or other forms of reproducing or capturing any of the Protected
19 Material. Notwithstanding this provision, Counsel are entitled to retain an archival copy
20 of all pleadings, motion papers, transcripts, legal memoranda, correspondence or attorney
21 work product, even if such materials contain Protected Material. Any such archival
22 copies that contain or constitute Protected Material remain subject to this Protective
23 Order as set forth in Section 4 (DURATION), above.

24 12. MISCELLANEOUS

25 12.1 Right to Further Relief. Nothing in this Order abridges the right of any
26 person to seek its modification by the Court in the future.

1 12.2 Right to Assert Other Objections. By stipulating to the entry of this
2 Protective Order no Party waives any right it otherwise would have to object to disclosing
3 or producing any information or item on any ground not addressed in this Stipulated
4 Protective Order. Similarly, no Party waives any right to object on any ground to use in
5 evidence of any of the material covered by this Protective Order.

6 12.3 Injunctive Relief. The Parties agree that disclosure of Protected Materials in
7 violation of this Order cannot be remedied through monetary relief alone, and that
8 injunctive relief is appropriate to prevent any threatened disclosure.

9 12.4 Jurisdiction. The Court shall retain jurisdiction over any disputes arising
10 from this Order **for a period of six months after final termination of this action.**

11 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

12 DATED: December 3, 2009

KIRKLAND & ELLIS LLP

/s/ Bradley H. Weidenhammer

Bradley H. Weidenhammer

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Counsel for Defendant SC Johnson & Son, Inc.

17 DATED: December 3, 2009

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Counsel for Plaintiff and the Proposed Class

~~PROPOSED~~ ORDER

24 PURSUANT TO STIPULATION, IT IS SO ORDERED.

26 DATED: December 3, 2009


Howard R. Loyd

United States 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 Stipulated Protective Order
that was issued by the United States District Court for the Northern District of California
on _____ in the case of *Koh v. SC Johnson & Son, Inc.*, Case no. 09-cv-00927 (RMW)
(N. D. Cal.). I agree to comply with and to be bound by all the terms of this Stipulated
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
Stipulated 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
Stipulated Protective Order, even if such enforcement proceedings occur after
termination of this action.

Date: _____
City and State where sworn and signed: _____
Printed name: _____
Signature: _____