

1 *See Next Page for Complete Counsel Information* *ORDER E-FILED 8/31/2009*
2 *for All Parties*

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MAITA DISTRIBUTORS, INC. OF SAN MATEO, a California corporation,
Plaintiff,
v.
DBI BEVERAGE, INC., a Tennessee corporation,
Defendant.
MILLERCOORS, LLC, a Delaware limited liability company,
Intervenor.

CASE NO. 5:09-CV-02318-RMW
STIPULATION & ORDER REGARDING CONFIDENTIALITY
(MODIFIED BY THE COURT)
Complaint Filed (in State Court):
May 6, 2009
Matter Removed on:
May 26, 2009
Judge: Hon. Ronald M. Whyte

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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 limited information or items that are entitled under the applicable legal
9 principles to treatment as confidential. The parties further acknowledge, as set forth in Section
10 10, below, that this Stipulated Protective Order creates no entitlement to file confidential
11 information under seal; Civil Local Rule 79-5 sets forth the procedures that must be followed
12 and reflects the standards that will be applied when a party seeks permission from the court to
13 file material under seal.

14 2. DEFINITIONS

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

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

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

24 2.4 “Highly Confidential – Attorneys’ Eyes Only” Information or Items:
25 extremely sensitive “Confidential Information or Items” whose disclosure to another Party or
26 non-party would create a substantial risk of serious injury that could not be avoided by less
27 restrictive means.

28 2.5 Receiving Party: a Party that receives Disclosure or Discovery Material

1 from a Producing Party.

2 2.6 Producing Party: a Party or non-party that produces Disclosure or
3 Discovery Material in this action.

4 2.7 Designating Party: a Party or non-party that designates information or
5 items that it produces in disclosures or in responses to discovery as “Confidential” or “Highly
6 Confidential — Attorneys’ Eyes Only.”

7 2.8 Protected Material: any Disclosure or Discovery Material that is
8 designated as “Confidential” or as “Highly Confidential – Attorneys’ Eyes Only.”

9 2.9 Outside Counsel: attorneys who are not employees of a Party but who are
10 retained to represent or advise a Party in this action.

11 2.10 House Counsel: attorneys who are employees of a Party.

12 2.11 Counsel (without qualifier): Outside Counsel and House Counsel (as well
13 as their support staffs).

14 2.12 Expert: a person with specialized knowledge or experience in a matter
15 pertinent to the litigation who has been retained by a Party or its counsel to serve as an expert
16 witness or as a consultant in this action and who is not a past or a current employee of a Party or
17 of a competitor of a Party’s and who, at the time of retention, is not anticipated to become an
18 employee of a Party or a competitor of a Party’s. This definition includes a professional jury or
19 trial consultant retained in connection with this litigation.

20 2.13 Professional Vendors: persons or entities that provide litigation support
21 services (e.g., photocopying; videotaping; translating; preparing exhibits or demonstrations;
22 organizing, storing, retrieving data in any form or medium; etc.) and their employees and
23 subcontractors.

24 3. SCOPE

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

1 4. DURATION

2 Even after the termination of this litigation, the confidentiality obligations imposed by
3 this Order shall remain in effect until a Designating Party agrees otherwise in writing or a court
4 order otherwise directs. **For a period of six months after the final termination of this action,
5 this court will retain jurisdiction to enforce the terms of this order.**

5 5. DESIGNATING PROTECTED MATERIAL

6 5.1 Exercise of Restraint and Care in Designating Material for Protection.

7 Each Party or non-party that designates information or items for protection under this Order must
8 take care to limit any such designation to specific material that qualifies under the appropriate
9 standards. A Designating Party must take care to designate for protection only those parts of
10 material, documents, items, or oral or written communications that qualify – so that other
11 portions of the material, documents, items, or communications for which protection is not
12 warranted are not swept unjustifiably within the ambit of this Order.

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

17 If it comes to a Party’s or a non-party’s attention that information or items that it
18 designated for protection do not qualify for protection at all, or do not qualify for the level of
19 protection initially asserted, that Party or non-party must promptly notify all other parties that it
20 is withdrawing the mistaken designation.

21 5.2 Manner and Timing of Designations. Except as otherwise provided in this

22 Order (see, e.g., second paragraph of section 5.2(a), below), or as otherwise stipulated or
23 ordered, material that qualifies for protection under this Order must be clearly so designated
24 before the material is disclosed or produced.

25 Designation in conformity with this Order requires:

26 (a) for information in documentary form (apart from transcripts of
27 depositions or other pretrial or trial proceedings), that the Producing Party affix the legend
28 “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” at the top

1 of each page that contains protected material. If only a portion or portions of the material on a
2 page qualifies for protection, the Producing Party also must clearly identify the protected
3 portion(s) (e.g., by making appropriate markings in the margins) and must specify, for each
4 portion, the level of protection being asserted (either “CONFIDENTIAL” or “HIGHLY
5 CONFIDENTIAL – ATTORNEYS’ EYES ONLY”).

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

20 (b) for testimony given in deposition or in other pretrial or trial
21 proceedings, that the Party or non-party offering or sponsoring the testimony identify on the
22 record, before the close of the deposition, hearing, or other proceeding, all protected testimony,
23 and further specify any portions of the testimony that qualify as “HIGHLY CONFIDENTIAL –
24 ATTORNEYS’ EYES ONLY.” When it is impractical to identify separately each portion of
25 testimony that is entitled to protection, and when it appears that substantial portions of the
26 testimony may qualify for protection, the Party or non-party that sponsors, offers, or gives the
27 testimony may invoke on the record (before the deposition or proceeding is concluded) a right to
28 have up to 20 days to identify the specific portions of the testimony as to which protection is

1 sought and to specify the level of protection being asserted (“CONFIDENTIAL” or “HIGHLY
2 CONFIDENTIAL – ATTORNEYS’ EYES ONLY”). Only those portions of the testimony that
3 are appropriately designated for protection within the 20 days shall be covered by the provisions
4 of this Stipulated Protective Order.

5 Transcript pages containing Protected Material must be separately bound
6 by the court reporter, who must affix to the top of each such page the legend
7 “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” as
8 instructed by the Party or non-party offering or sponsoring the witness or presenting the
9 testimony.

10 (c) for information produced in some form other than documentary,
11 and for any other tangible items, that the Producing Party affix in a prominent place on the
12 exterior of the container or containers in which the information or item is stored the legend
13 “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.” If only
14 portions of the information or item warrant protection, the Producing Party, to the extent
15 practicable, shall identify the protected portions, specifying whether they qualify as
16 “Confidential” or as “Highly Confidential – Attorneys’ Eyes Only.”

17 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent
18 failure to designate qualified information or items as “Confidential” or “Highly Confidential –
19 Attorneys’ Eyes Only” does not, standing alone, waive the Designating Party’s right to secure
20 protection under this Order for such material. If material is appropriately designated as
21 “Confidential” or “Highly Confidential – Attorneys’ Eyes Only” after the material was initially
22 produced, the Receiving Party, on timely notification of the designation, must make reasonable
23 efforts to assure that the material is treated in accordance with the provisions of this Order.

24 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

25 6.1 Timing of Challenges. Unless a prompt challenge to a Designating Party’s
26 confidentiality designation is necessary to avoid foreseeable substantial unfairness, unnecessary
27 economic burdens, or a later significant disruption or delay of the litigation, a Party does not
28 waive its right to challenge a confidentiality designation by electing not to mount a challenge

1 promptly after the original designation is disclosed.

2 6.2 Meet and Confer. A Party that elects to initiate a challenge to a
3 Designating Party’s confidentiality designation must do so in good faith and must begin the
4 process by conferring directly (in voice to voice dialogue; other forms of communication are not
5 sufficient) with counsel for the Designating Party. In conferring, the challenging Party must
6 explain the basis for its belief that the confidentiality designation was not proper and must give
7 the Designating Party an opportunity to review the designated material, to reconsider the
8 circumstances, and, if no change in designation is offered, to explain the basis for the chosen
9 designation. A challenging Party may proceed to the next stage of the challenge process only if
10 it has engaged in this meet and confer process first.

11 6.3 Judicial Intervention. A Party that elects to press a challenge to a
12 confidentiality designation after considering the justification offered by the Designating Party
13 may file and serve a motion under Civil Local Rule 7 (and in compliance with Civil Local Rule
14 79-5, if applicable) that identifies the challenged material and sets forth in detail the basis for the
15 challenge. Each such motion must be accompanied by a competent declaration that affirms that
16 the movant has complied with the meet and confer requirements imposed in the preceding
17 paragraph and that sets forth with specificity the justification for the confidentiality designation
18 that was given by the Designating Party in the meet and confer dialogue.

19 The burden of persuasion in any such challenge proceeding shall be on the
20 Designating Party. Until the court rules on the challenge, all parties shall continue to afford the
21 material in question the level of protection to which it is entitled under the Producing Party’s
22 designation.

23 7. ACCESS TO AND USE OF PROTECTED MATERIAL

24 7.1 Basic Principles. A Receiving Party may use Protected Material that is
25 disclosed or produced by another Party or by a non-party in connection with this case only for
26 prosecuting, defending, or attempting to settle this litigation. Such Protected Material may be
27 disclosed only to the categories of persons and under the conditions described in this Order.
28 When the litigation has been terminated, a Receiving Party must comply with the provisions of

1 section 11, below (FINAL DISPOSITION).

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

5 7.2 Disclosure of “CONFIDENTIAL” Information or Items. Unless
6 otherwise ordered by the court or permitted in writing by the Designating Party, a Receiving
7 Party may disclose any information or item designated CONFIDENTIAL only to:

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

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

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

18 (d) the Court and its personnel;

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

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

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

1 7.3 Disclosure of “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES
2 ONLY” Information or Items. Unless otherwise ordered by the court or permitted in writing by
3 the Designating Party, a Receiving Party may disclose any information or item designated
4 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” only to:

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

9 (b) Experts (as defined in this Order) (1) to whom disclosure is
10 reasonably necessary for this litigation, (2) who have signed the “Agreement to Be Bound by
11 Protective Order” (Exhibit A).

12 (c) the Court and its personnel;

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

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

18 8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN
19 OTHER LITIGATION.

20 If a Receiving Party is served with a subpoena or an order issued in other litigation that
21 would compel disclosure of any information or items designated in this action as
22 “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” the
23 Receiving Party must so notify the Designating Party, in writing (by fax, if possible)
24 immediately and in no event more than three court days after receiving the subpoena or order.
25 Such notification must include a copy of the subpoena or court order.

26 The Receiving Party also must immediately inform in writing the Party who caused the
27 subpoena or order to issue in the other litigation that some or all the material covered by the
28 subpoena or order is the subject of this Protective Order. In addition, the Receiving Party must

1 deliver a copy of this Stipulated Protective Order promptly to the Party in the other action that
2 caused the subpoena or order to issue.

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

9 9. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

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

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

21 11. FINAL DISPOSITION. Unless otherwise ordered or agreed in writing by the
22 Producing Party, within sixty days after the final termination of this action, each Receiving Party
23 must return all Protected Material to the Producing Party. As used in this subdivision, “all
24 Protected Material” includes all copies, abstracts, compilations, summaries or any other form of
25 reproducing or capturing any of the Protected Material. With permission in writing from the
26 Designating Party, the Receiving Party may destroy some or all of the Protected Material instead
27 of returning it. Whether the Protected Material is returned or destroyed, the Receiving Party
28 must submit a written certification to the Producing Party (and, if not the same person or entity,

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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 _____, 200__ in the case of *Maita Distributors, Inc. of San Mateo v. DBI Beverage, Inc.*, Case No. 5:09-cv-02318-RMW. 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.

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]