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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MICROSOFT CORPORATION,)
)
Plaintiff,)
)
v.)
)
TIVO, INC.,)
)
Defendant.)
_____)

Case No.: C 10-0240 LHK (PSG)

**FURTHER INTERIM ORDER RE
PARTIES' PROPOSED FORM OF
STIPULATED PROTECTIVE ORDER**

(Re: Docket No. 26)

Currently pending before the court is the parties' proposed stipulation for protective order. Magistrate Judge Patricia V. Trumbull previously entered an interim order requiring the parties shall submit a revised form of protective order based on this court's model form of "Stipulated Protective Order for Litigation Involving Patents, Highly Sensitive Confidential Information And/or Trade Secrets" (the "Interim Order"). The Interim Order also required that the parties submit a joint brief setting forth each portion of any alternate language they wish to use, explaining why the alternate language is reasonably necessary for this case. The parties submitted a joint motion requesting numerous modifications to the court's model form of protective order. Based on the parties' revised proposed form of protective order, and their joint motion,

IT IS HEREBY ORDERED that, with the following exceptions, the parties' revised proposed form of protective order is acceptable to the court. The portions which are unacceptable to the court

1 are the parties' proposed sections 13, 14.4, 14.5, and 14.7.

2 As drafted, the parties' proposed Section 13 is unacceptable because it purports to
3 automatically relieve a party of any waiver of privilege or other protections from discovery without
4 regard to whether the party took reasonable steps to prevent disclosure of the privileged information.
5 The parties shall revise their proposed Section 13 to clarify that a party is relieved from waiver only
6 if the inadvertent disclosure occurred despite the party having taken reasonable steps to prevent such
7 disclosures. The parties may include a provision allowing for pre-production non-waiver agreements
8 for specific productions where the amount of material produced and the time constraints imposed for
9 the production make a full pre-production review for privileged and protected materials impractical.
10 Any such specific pre-production agreements must include a reasonable post-production time frame
11 for the producing party to complete a reasonable review for privileged and protected materials.

12 The parties' proposed Section 14.4 needs to be revised to clarify that any materials that were
13 given confidentiality designations in *TiVo, Inc. v. Echostar Communications Corp., et al.*, No. 2-04-
14 CV-01-DF (E.D. Tex.), when produced or used in this action, are subject to the provisions of this
15 court's protective order regarding challenges to confidentiality designations and the requirement to
16 follow the procedure set forth in Local Rule 79-5 if any party seeks to file any of the materials with
17 the court.

18 The parties' proposed Section 14.5 is no longer appropriate in light of the recent amendments
19 to Federal Rules of Civil Procedure 26(b)(4).

20 The parties' proposed Section 14.7 is unacceptable to the extent it purports to modify the
21 parties' obligations under the protective order issued by the district court in Texas in *TiVo, Inc. v.*
22 *Echostar Communications Corp., et al.*, No. 2-04-CV-01-DF (E.D. Tex.). Any such modification of
23 the parties' obligations under the Texas district court's order must be obtained from that court. The
24 parties shall revise Section 14.7 to provide only that documents produced in this action may be used
25 in the Texas action, and that the confidentiality designations made to documents produced in this
26 action will be deemed to be made under the protective order in the Texas action as well (subject to
27 any challenges provided for under either protective order).

28 IT IS FURTHER ORDERED that, no later than March 15, 2011, the parties shall submit a

1 further revised form of protective order consistent with this order.

2 IT IS FURTHER ORDERED that, pending final entry of the protective order, the parties
3 revised proposed form of protective order, as modified herein, shall govern the handling of
4 confidential information in this action.

5 Dated: *February 16, 2011*

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8 PAUL S. GREWAL
9 United States Magistrate Judge
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