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16 UNITED STATES DISTRICT COURT
 17 NORTHERN DISTRICT OF CALIFORNIA

18 KIM LA BARBER SMITH, an individual,

19 Plaintiff,

20 vs.

21 VMWARE, INC., a Delaware Corporation,

22 Defendant.

CASE NO. CV11-02787-PSG

STIPULATED PROTECTIVE ORDER

23 Plaintiff KIM LA BARBER SMITH and Defendant VMWARE, INC., subject to
 24 the approval of the Court, hereby stipulate and agree to entry of this Stipulated Protective Order.

25 **1. PURPOSES AND LIMITATIONS**

26 Disclosure and discovery activity in this action are likely to involve production of
 27 confidential, proprietary, or private information for which special protection from public
 28 disclosure and from use for any purpose other than prosecuting this litigation may be warranted.

Accordingly, the parties hereby stipulate to and petition the court to enter the following

1 Stipulated Protective Order. The parties acknowledge that this Order does not confer blanket
2 protections on all disclosures or responses to discovery and that the protection it affords from
3 public disclosure and use extends only to the limited information or items that are entitled to
4 confidential treatment under the applicable legal principles. The parties further acknowledge, as
5 set forth in Section 12.3, below, that this Stipulated Protective Order does not entitle them to file
6 confidential information under seal; Civil Local Rule 79-5 sets forth the procedures that must be
7 followed and the standards that will be applied when a party seeks permission from the court to
8 file material under seal.

9 **2. DEFINITIONS**

10 2.1 Challenging Party: a Party or Non-Party that challenges the designation of
11 information or items under this Order.

12 2.2 "CONFIDENTIAL" Information or Items: information (regardless of how
13 it is generated, stored or maintained) or tangible things that qualify for protection under Federal
14 Rule of Civil Procedure 26(c).

15 2.3 Counsel (without qualifier): Outside Counsel of Record and House
16 Counsel (as well as their support staff).

17 2.4 Designating Party: a Party or Non-Party that designates information or
18 items that it produces in disclosures or in responses to discovery as "CONFIDENTIAL."

19 2.5 Disclosure or Discovery Material: all items or information, regardless of
20 the medium or manner in which it is generated, stored, or maintained (including, among other
21 things, testimony, transcripts, and tangible things), that are produced or generated in disclosures
22 or responses to discovery in this matter.

23 2.6 Expert: a person with specialized knowledge or experience in a matter
24 pertinent to the litigation who has been retained by a Party or its counsel to serve as an expert
25 witness or as a consultant in this action.
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1 2.7 House Counsel: attorneys who are employees of a party to this action.
2 House Counsel does not include Outside Counsel of Record or any other outside counsel.

3 2.8 Non-Party: any natural person, partnership, corporation, association, or
4 other legal entity not named as a Party to this action.

5 2.9 Outside Counsel of Record: attorneys who are not employees of a party to
6 this action but are retained to represent or advise a party to this action and have appeared in this
7 action on behalf of that party or are affiliated with a law firm which has appeared on behalf of
8 that party.

9 2.10 Party: any party to this action, including all of its officers, directors,
10 employees, consultants, retained experts, and Outside Counsel of Record (and their support
11 staffs).

12 2.11 Producing Party: a Party or Non-Party that produces Disclosure or
13 Discovery Material in this action.

14 2.12 Professional Vendors: persons or entities that provide litigation support
15 services (e.g., photocopying, videotaping, translating, preparing exhibits or demonstrations, and
16 organizing, storing, or retrieving data in any form or medium) and their employees and
17 subcontractors.

18 2.13 Protected Material: any Disclosure or Discovery Material that is
19 designated as "CONFIDENTIAL."
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21 2.14 Receiving Party: a Party that receives Disclosure or Discovery Material
22 from a Producing Party.

23 **3. SCOPE**

24 The protections conferred by this Stipulation and Order cover not only Protected
25 Material (as defined above), but also (1) any information copied or extracted from Protected
26 Material; (2) all copies, excerpts, summaries, or compilations of Protected Material; and (3) any
27 testimony, conversations, or presentations by Parties or their Counsel that might reveal Protected
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1 Material. However, the protections conferred by this Stipulation and Order do not cover the
2 following information: (a) any information that is in the public domain at the time of disclosure
3 to a Receiving Party or becomes part of the public domain after its disclosure to a Receiving
4 Party as a result of publication not involving a violation of this Order, including becoming part
5 of the public record through trial or otherwise; and (b) any information known to the Receiving
6 Party prior to the disclosure or obtained by the Receiving Party after the disclosure from a source
7 who obtained the information lawfully and under no obligation of confidentiality to the
8 Designating Party. Any use of Protected Material at trial shall be governed by a separate
9 agreement or order.

10 **4. DURATION**

11 Even after final disposition of this litigation, the confidentiality obligations
12 imposed by this Order shall remain in effect until a Designating Party agrees otherwise in writing
13 or a court order otherwise directs. Final disposition shall be deemed to be the later of (1)
14 dismissal of all claims and defenses in this action, with or without prejudice; and (2) final
15 judgment herein after the completion and exhaustion of all appeals, rehearings, remands, trials,
16 or reviews of this action, including the time limits for filing any motions or applications for
17 extension of time pursuant to applicable law.

18 **5. DESIGNATING PROTECTED MATERIAL**

19 **5.1 Exercise of Restraint and Care in Designating Material for Protection.**

20 Each Party or Non-Party that designates information or items for protection under this Order
21 must take care to limit any such designation to specific material that qualifies under the
22 appropriate standards. The Designating Party must designate for protection only those parts of
23 material, documents, items, or oral or written communications that qualify – so that other
24 portions of the material, documents, items, or communications for which protection is not
25 warranted are not swept unjustifiably within the ambit of this Order.
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1 Mass, indiscriminate, or routinized designations are prohibited. Designations that
2 are shown to be clearly unjustified or that have been made for an improper purpose (e.g., to
3 unnecessarily encumber or retard the case development process or to impose unnecessary
4 expenses and burdens on other parties) expose the Designating Party to sanctions.

5 If it comes to a Designating Party's attention that information or items that it
6 designated for protection do not qualify for protection, that Designating Party must promptly
7 notify all other Parties that it is withdrawing the mistaken designation.

8 5.2 Manner and Timing of Designations. Except as otherwise provided in this
9 Order (see, e.g., second paragraph of section 5.2(a) below), or as otherwise stipulated or ordered,
10 Disclosure or Discovery Material that qualifies for protection under this Order must be clearly so
11 designated before the material is disclosed or produced.

12 Designation in conformity with this Order requires:

13 (a) for information in documentary form (e.g., paper or electronic documents, but
14 excluding transcripts of depositions or other pretrial or trial proceedings), that the Producing
15 Party affix the legend "CONFIDENTIAL" to each page that contains protected material. If only
16 a portion or portions of the material on a page qualifies for protection, the Producing Party also
17 must clearly identify the protected portion(s) (e.g., by making appropriate markings in the
18 margins).
19

20 A Party or Non-Party that makes original documents or materials available for
21 inspection need not designate them for protection until after the inspecting Party has indicated
22 which material it would like copied and produced. During the inspection and before the
23 designation, all of the material made available for inspection shall be deemed
24 "CONFIDENTIAL." After the inspecting Party has identified the documents it wants copied and
25 produced, the Producing Party must determine which documents, or portions thereof, qualify for
26 protection under this Order. Then, before producing the specified documents, the Producing
27 Party must affix the "CONFIDENTIAL" legend to each page that contains Protected Material. If
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1 only a portion or portions of the material on a page qualifies for protection, the Producing Party
2 also must clearly identify the protected portion(s) (e.g., by making appropriate markings in the
3 margins).

4 (b) for testimony given in deposition or in other pretrial or trial proceedings, that
5 the Designating Party identify on the record, before the close of the deposition, hearing, or other
6 proceeding, or in writing, no later than thirty (30) days after receipt of the deposition transcript
7 by counsel for the witness, all protected testimony.

8 (c) for information produced in some form other than documentary and for any
9 other tangible items, that the Producing Party affix in a prominent place on the exterior of the
10 container or containers in which the information or item is stored the legend
11 "CONFIDENTIAL." If only a portion or portions of the information or item warrant protection,
12 the Producing Party, to the extent practicable, shall identify the protected portion(s).

13 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent
14 failure to designate qualified information or items does not, standing alone, waive the
15 Designating Party's right to secure protection under this Order for such material. Upon timely
16 correction of a designation, the Receiving Party must make reasonable efforts to assure that the
17 material is treated in accordance with the provisions of this Order.

18 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

19 6.1 Timing of Challenges. Any Party or Non-Party may challenge a
20 designation of confidentiality at any time. Unless a prompt challenge to a Designating Party's
21 confidentiality designation is necessary to avoid foreseeable, substantial unfairness, unnecessary
22 economic burdens, or a significant disruption or delay of the litigation, a Party does not waive its
23 right to challenge a confidentiality designation by electing not to mount a challenge promptly
24 after the original designation is disclosed.

25 6.2 Meet and Confer. The Challenging Party shall initiate the dispute
26 resolution process by providing written notice of each designation it is challenging and
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1 describing the basis for each challenge. To avoid ambiguity as to whether a challenge has been
2 made, the written notice must recite that the challenge to confidentiality is being made in
3 accordance with this specific paragraph of the Protective Order. The parties shall attempt to
4 resolve each challenge in good faith and must begin the process by conferring directly (in voice
5 to voice dialogue; other forms of communication are not sufficient) within 14 days of the date of
6 service of notice. In conferring, the Challenging Party must explain the basis for its belief that
7 the confidentiality designation was not proper and must give the Designating Party an
8 opportunity to review the designated material, to reconsider the circumstances, and, if no change
9 in designation is offered, to explain the basis for the chosen designation. A Challenging Party
10 may proceed to the next stage of the challenge process only if it has engaged in this meet and
11 confer process first or establishes that the Designating Party is unwilling to participate in the
12 meet and confer process in a timely manner.

13
14 6.3 Judicial Intervention. If the Parties cannot resolve a challenge without
15 court intervention, the Designating Party shall file and serve a motion to retain confidentiality
16 under Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5, if applicable) within 21
17 days of the initial notice of challenge or within 14 days of the parties agreeing that the meet and
18 confer process will not resolve their dispute, whichever is earlier. Each such motion must be
19 accompanied by a competent declaration affirming that the movant has complied with the meet
20 and confer requirements imposed in the preceding paragraph. Failure by the Designating Party to
21 make such a motion including the required declaration within 21 days (or 14 days, if applicable)
22 shall automatically waive the confidentiality designation for each challenged designation. In
23 addition, the Challenging Party may file a motion challenging a confidentiality designation at
24 any time if there is good cause for doing so, including a challenge to the designation of a
25 deposition transcript or any portions thereof. Any motion brought pursuant to this provision must
26 be accompanied by a competent declaration affirming that the movant has complied with the
27 meet and confer requirements imposed by the preceding paragraph.

1 The burden of persuasion in any such challenge proceeding shall be on the
2 Designating Party. Frivolous challenges, and those made for an improper purpose (e.g., to harass
3 or impose unnecessary expenses and burdens on other parties) may expose the Challenging Party
4 to sanctions. Unless the Designating Party has waived the confidentiality designation by failing
5 to file a motion to retain confidentiality as described above, all parties shall continue to afford
6 the material in question the level of protection to which it is entitled under the Producing Party's
7 designation until the court rules on the challenge.

8 **7. ACCESS TO AND USE OF PROTECTED MATERIAL**

9 7.1 Basic Principles. A Receiving Party may use Protected Material that is
10 disclosed or produced by another Party or by a Non-Party in connection with this case only for
11 prosecuting, defending, or attempting to settle this litigation. Such Protected Material may be
12 disclosed only to the categories of persons and under the conditions described in this Order.
13 When the litigation has been terminated, a Receiving Party must comply with the provisions of
14 section 13 below (FINAL DISPOSITION).

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

18 7.2 Disclosure of "CONFIDENTIAL" Information or Items. Unless otherwise
19 ordered by the court or permitted in writing by the Designating Party, a Receiving Party may
20 disclose any information or item designated "CONFIDENTIAL" only to:

21 (a) the Receiving Party's Outside Counsel of Record in this action, as well as
22 employees of said Outside Counsel of Record to whom it is reasonably necessary to disclose the
23 information for this litigation and who have signed the "Acknowledgment and Agreement to Be
24 Bound" that is attached hereto as Exhibit A;
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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
3 signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A);

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

7 (d) the court and its personnel;

8 (e) court reporters and their staff, professional jury or trial consultants, mock
9 jurors, and Professional Vendors to whom disclosure is reasonably necessary for this litigation
10 and who have signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A);

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

17 (g) the author or recipient of a document containing the information or a
18 custodian or other person who otherwise possessed or knew the information.

19
20 **8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN**
21 **OTHER LITIGATION**

22 If a Party is served with a subpoena or a court order issued in other litigation that
23 compels disclosure of any information or items designated in this action as "CONFIDENTIAL,"
24 that Party must:

25 (a) promptly notify in writing the Designating Party. Such notification shall
26 include a copy of the subpoena or court order;

1 (b) promptly notify in writing the party who caused the subpoena or order to issue
2 in the other litigation that some or all of the material covered by the subpoena or order is subject
3 to this Protective Order. Such notification shall include a copy of this Stipulated Protective
4 Order; and

5 (c) cooperate with respect to all reasonable procedures sought to be pursued by
6 the Designating Party whose Protected Material may be affected.

7 If the Designating Party timely seeks a protective order, the Party served with the
8 subpoena or court order shall not produce any information designated in this action as
9 "CONFIDENTIAL" before a determination by the court from which the subpoena or order
10 issued, unless the Party has obtained the Designating Party's permission. The Designating Party
11 shall bear the burden and expense of seeking protection in that court of its confidential material –
12 and nothing in these provisions should be construed as authorizing or encouraging a Receiving
13 Party in this action to disobey a lawful directive from another court.

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15 **9. A NON-PARTY'S PROTECTED MATERIAL SOUGHT TO BE PRODUCED IN**
16 **THIS LITIGATION**

17 (a) The terms of this Order are applicable to information produced by a Non-Party
18 in this action and designated as "CONFIDENTIAL." Such information produced by Non-Parties
19 in connection with this litigation is protected by the remedies and relief provided by this Order.
20 Nothing in these provisions should be construed as prohibiting a Non-Party from seeking
21 additional protections.

22 (b) In the event that a Party is required, by a valid discovery request, to produce a
23 Non-Party's confidential information in its possession, and the Party is subject to an agreement
24 with the Non-Party not to produce the Non-Party's confidential information, then the Party shall:

25 1. promptly notify in writing the Requesting Party and the Non-Party that some or
26 all of the information requested is subject to a confidentiality agreement with a Non-Party;
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1 2. promptly provide the Non-Party with a copy of the Stipulated Protective Order
2 in this litigation, the relevant discovery request(s), and a reasonably specific description of the
3 information requested; and

4 3. make the information requested available for inspection by the Non-Party.

5 (c) If the Non-Party fails to object or seek a protective order from this court
6 within 14 days of receiving the notice and accompanying information, the Receiving Party may
7 produce the Non-Party's confidential information responsive to the discovery request. If the
8 Non-Party timely seeks a protective order, the Receiving Party shall not produce any information
9 in its possession or control that is subject to the confidentiality agreement with the Non-Party
10 before a determination by the court.1 Absent a court order to the contrary, the Non-Party shall
11 bear the burden and expense of seeking protection in this court of its Protected Material.

12 **10. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL**

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

20 **11. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE**
21 **PROTECTED MATERIAL**

22 When a Producing Party gives notice to Receiving Parties that certain
23 inadvertently produced material is subject to a claim of privilege or other protection, the
24 obligations of the Receiving Parties are those set forth in Federal Rule of Civil Procedure
25 26(b)(5)(B). This provision is not intended to modify whatever procedure may be established in
26 an e-discovery order that provides for production without prior privilege review. Pursuant to
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1 Federal Rule of Evidence 502(d) and (e), insofar as the parties reach an agreement on the effect
2 of disclosure of a communication or information covered by the attorney-client privilege or work
3 product protection, the parties may incorporate their agreement in the stipulated protective order
4 submitted to the court.

5 **12. MISCELLANEOUS**

6 12.1 Right to Further Relief. Nothing in this Order abridges the right of any
7 person to seek its modification by the court in the future.

8 12.2 Right to Assert Other Objections. By stipulating to the entry of this
9 Protective Order no Party waives any right it otherwise would have to object to disclosing or
10 producing any information or item on any ground not addressed in this Stipulated Protective
11 Order. Similarly, no Party waives any right to object on any ground to use in evidence of any of
12 the material covered by this Protective Order.

13 12.3 Filing Protected Material. Without written permission from the
14 Designating Party or a court order secured after appropriate notice to all interested persons, a
15 Party may not file in the public record in this action any Protected Material. A Party that seeks to
16 file under seal any Protected Material must comply with Civil Local Rule 79-5. Protected
17 Material may only be filed under seal pursuant to a court order authorizing the sealing of the
18 specific Protected Material at issue. Pursuant to Civil Local Rule 79-5, a sealing order will issue
19 only upon a request establishing that the Protected Material at issue is privileged, protectable as a
20 trade secret, or otherwise entitled to protection under the law. If a Receiving Party's request to
21 file Protected Material under seal pursuant to Civil Local Rule 79-5(d) is denied by the court,
22 then the Receiving Party may file the information in the public record pursuant to Civil Local
23 Rule 79-5(e) unless otherwise instructed by the court.

24 **13. FINAL DISPOSITION**

25 Within 60 days after the final disposition of this action, as defined in paragraph 4,
26 each Receiving Party must return all Protected Material to the Producing Party or destroy such
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1 material. As used in this subdivision, "all Protected Material" includes all copies, abstracts,
 2 compilations, summaries, and any other format reproducing or capturing any of the Protected
 3 Material. Whether the Protected Material is returned or destroyed, the Receiving Party must
 4 submit a written certification to the Producing Party (and, if not the same person or entity, to the
 5 Designating Party) by the 60 day deadline that (1) identifies (by category, where appropriate) all
 6 the Protected Material that was returned or destroyed and (2) affirms that the Receiving Party has
 7 not retained any copies, abstracts, compilations, summaries or any other format reproducing or
 8 capturing any of the Protected Material. Notwithstanding this provision, Counsel are entitled to
 9 retain an archival copy of all pleadings, motion papers, trial, deposition, and hearing transcripts,
 10 legal memoranda, correspondence, deposition and trial exhibits, expert reports, attorney work
 11 product, and consultant and expert work product, even if such materials contain Protected
 12 Material. Any such archival copies that contain or constitute Protected Material remain subject to
 13 this Protective Order as set forth in Section 4 (DURATION).

14 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

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17 Date: October 4, 2011



Tyler M. Paetkau
Attorney for Defendant
VMWARE, INC.

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20 Date: October 4, 2011



Frank E. Mayo
Attorney for Plaintiff
KIM LA BARBER SMITH

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24 PURSUANT TO STIPULATION, IT IS SO ORDERED.

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26 DATED: 10/11/2011



Hon. Paul S. Grewal
United States District/Magistrate Judge

1 EXHIBIT A

2 ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

3 I, _____, declare under penalty of perjury that I
4 have read in its entirety and understand the Stipulated Protective Order that was issued by the
5 United States District Court for the Northern District of California on
6 _____ in the case of *Kim La Barber Smith v. VMware, Inc.*, Case No. 11-
7 CO2787-PSG. I agree to comply with and to be bound by all the terms of this Stipulated
8 Protective Order and I understand and acknowledge that failure to so comply could expose me to
9 sanctions and punishment in the nature of contempt. I solemnly promise that I will not disclose
10 in any manner any information or item that is subject to this Stipulated Protective Order to any
11 person or entity except in strict compliance with the provisions of this Order.
12

13 I further agree to submit to the jurisdiction of the United States District Court for
14 the Northern District of California for the purpose of enforcing the terms of this Stipulated
15 Protective Order, even if such enforcement proceedings occur after termination of this action.

16 I hereby appoint _____ [print or type full name] of
17 _____ [print or type full address and telephone
18 number] as my California agent for service of process in connection with this action or any
19 proceedings related to enforcement of this Stipulated Protective Order.

20 Date: _____

21 City and State where sworn and signed: _____

22 Printed name: _____

23 Signature: _____
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