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17 **UNITED STATES DISTRICT COURT**
 18 **NORTHERN DISTRICT OF CALIFORNIA**
 19 **SAN JOSE DIVISION**

20 ROBERT HERSKOWITZ, et al.,)
)
 21)
)
 22 _____)
 PHOEBE JUEL, et al.,)
 23) Plaintiffs,)
)
 24 v.)
)
 25 APPLE INC.,)
) Defendant.)
 26)
)
 27 _____)

Case No. 12-CV-02131-LHK
 Case No. 12-CV-03124-LHK

**AGREED PROTECTIVE ORDER
 REGARDING THE DISCLOSURE
 AND USE OF SOURCE CODE**

Courtroom: 8, 4th Floor, San Jose
 Hon. Lucy H. Koh

1 It is possible that documents, testimony, or information produced or disclosed during the
2 course of this litigation may reflect “Source Code” as that term is defined below. Documents,
3 testimony, or information reflecting Source Code are to be protected in the same manner as
4 “Protected Material” as that term is set forth in the parties’ Stipulated Protective Order (Dkt. No.
5 61), and are further subject to the additional protections provided in this Agreed Protective Order
6 Regarding the Disclosure and Use of Source Code (“Source Code Protective Order”). The
7 Plaintiffs Robert Herskowitz and Phoebe Juel (“Plaintiffs”) and Apple Inc. (“Apple”)
8 (collectively “the Parties”) therefore request that the Court enter this Source Code Protective
9 Order setting forth the conditions for treating, obtaining, and using such information.

10 Pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, the Court finds good cause
11 for entering the following Source Code Protective Order.

12 **1. PURPOSES AND LIMITATIONS**

13 Disclosure and discovery activity in the above-captioned action may involve production of
14 materials reflecting highly confidential, proprietary, and private Source Code (as that term is
15 defined below) for which special protection from public disclosure and from use for any purpose
16 other than prosecuting this litigation would be warranted. Further protection is warranted beyond
17 the protection conferred by the Parties’ Stipulated Protective Order (Dkt. No. 61) entered in this
18 case. Accordingly, the parties hereby stipulate to and petition the Court to enter the following
19 Source Code Protective Order. Nothing in this Order shall be construed as a representation or
20 admission that Source Code is properly discoverable in this Action, or to obligate any Party to
21 produce any Source Code.

22 **2. DEFINITIONS**

23 2.1 Action: The above-captioned action, presently pending in the United States
24 District Court for the Northern District of California.

25 2.2 Counsel (without qualifier): Outside Counsel and In-House Counsel (as well as
26 their support staffs).

27 2.3 Designating Party: A Party or non-party that designates information or items it
28 produces in disclosures or in responses to discovery as “HIGHLY CONFIDENTIAL - SOURCE

1 CODE INFORMATION.”

2 2.4 Disclosure or Discovery Material: All items or information, regardless of the
3 medium or manner in which it is generated, stored or maintained (including, among other things,
4 testimony, transcripts, or tangible things), that is produced or generated in disclosures or
5 responses to discovery in this matter.

6 2.5 Expert: A person with specialized knowledge or experience in a matter pertinent
7 to the litigation who has been retained by a Party or its Counsel to serve as an expert witness or as
8 a consultant in these actions and who is not a past or a current employee of a Party or of any
9 entity on the Restricted Competitors List and who, at the time of retention, is not anticipated to
10 become an employee of a Party or any entity on the Restricted Competitors List. This definition
11 includes any professional jury or trial consultant retained in connection with this litigation but
12 does not include mock jurors. A list of Apple’s restricted competitors was separately produced to
13 Outside Counsel in connection with the Stipulated Protective Order (Dkt. No. 61).

14 2.6 In-House Counsel: Attorneys who are employees of a Party.

15 2.7 “HIGHLY CONFIDENTIAL - SOURCE CODE INFORMATION” Items:
16 Disclosure or Discovery Material that reflects, in whole or in part, Source Code (including source
17 code and source code listings, object code and object code listings, executable code and similar
18 sensitive software code, whether in electronic or printed form).

19 2.8 Outside Counsel: Attorneys who are not employees of a Party but who are
20 employed at law firms that appear on the pleadings as counsel for a Party in these actions.

21 2.9 Producing Party: A Party or non-party that provides, produces, or makes available
22 for inspection materials reflecting Source Code or items designated “HIGHLY CONFIDENTIAL
23 - SOURCE CODE INFORMATION” in the course of this Action.

24 2.10 Receiving Party: A Party that receives materials reflecting Source Code or items
25 designated “HIGHLY CONFIDENTIAL - SOURCE CODE INFORMATION” provided,
26 produced, or made available for inspection by a Producing Party in the course of this Action.

27 2.11 Source Code: Any portion of computer code, scripts, assembly, binaries, object
28 code, source code listings and descriptions of source code, object code listings and descriptions of

1 object code, and Hardware Description Language (HDL) or Register Transfer Level (RTL) files
2 that describe the hardware design of any ASIC or other chip.

3 **3. SCOPE**

4 Per Section 3 of the Stipulated Protective Order entered in this Action (Dkt. No. 61 at 4),
5 this Source Code Protective Order shall govern any and all documents, data, information,
6 interrogatory responses, deposition testimony, deposition transcripts, responses to requests for
7 admission, and any other materials reflecting, in whole or in part, Source Code, including those
8 designated as “HIGHLY CONFIDENTIAL - SOURCE CODE INFORMATION.” The
9 protections conferred by this Source Code Protective Order cover not only such materials, but
10 also any information copied or extracted therefrom, as well as all copies, excerpts, summaries, or
11 compilations thereof, plus testimony, conversations or presentations by Parties or Counsel to or in
12 court or in other settings that might reveal material reflecting, in whole or in part, Source Code.

13 Nothing herein shall be construed to prevent a Producing Party from reviewing, using, or
14 disclosing its materials reflecting Source Code, including those designated “HIGHLY
15 CONFIDENTIAL - SOURCE CODE INFORMATION,” in any manner that it deems
16 appropriate.

17 This Source Code Protective Order is without prejudice to the Parties’ rights to propose,
18 request, or otherwise move for different provisions relating to Source Code production and/or
19 protection in any way, including, without limitation, an order that certain matter not be produced
20 at all.

21 **4. DURATION**

22 After the final termination of this Action, the confidentiality obligations imposed by this
23 Source Code Protective Order shall remain in effect until a Designating Party agrees otherwise in
24 writing or a Court otherwise directs.

25 **5. ACCESS TO AND USE OF MATERIALS REFLECTING SOURCE CODE**

26 A Receiving Party may use materials reflecting Source Code, including those designated
27 “HIGHLY CONFIDENTIAL - SOURCE CODE INFORMATION,” that are disclosed or produced
28 by another Party or by a non-party in connection with this Action only for prosecuting, defending, or

1 attempting to settle this litigation. A Receiving Party may not use materials reflecting Source Code,
2 including those designated “HIGHLY CONFIDENTIAL - SOURCE CODE INFORMATION,”
3 for any other purpose, including, without limitation, any other litigation or any business or
4 competitive function. Such materials may be disclosed only to the categories of persons and under
5 the conditions described in this Order. For purposes of this Source Code Protective Order, and
6 specifically as utilized in the preceding sentence, “disclosed” or “disclose” shall mean any physical or
7 electronic showing of the materials reflecting Source Code, including those designated “HIGHLY
8 CONFIDENTIAL - SOURCE CODE INFORMATION,” to any person, including communication
9 in any form of the contents (in whole or in part) or existence of the materials reflecting Source Code.
10 When this litigation has been terminated, a Receiving Party must comply with the provisions of
11 Section 13 below (FINAL DISPOSITION).

12 Materials reflecting Source Code, including those designated “HIGHLY CONFIDENTIAL -
13 SOURCE CODE INFORMATION,” must be stored and maintained by a Receiving Party at a
14 location and in a secure manner ensuring that access is limited to the persons authorized under this
15 Source Code Protective Order.

16 **6. DESIGNATING MATERIALS AS “HIGHLY CONFIDENTIAL – SOURCE**
17 **CODE INFORMATION”**

18 6.1 Procedures for Designating Material for Protection: Any Party to this litigation, or
19 any non-party, who produces Disclosure or Discovery Material that reflects, in whole or in part,
20 Source Code, shall have the right to designate such material as “Highly Confidential – Source
21 Code Information.” All material designated as “HIGHLY CONFIDENTIAL - SOURCE CODE
22 INFORMATION” shall bear a legend on each page consistent with Sections 6.2(i) and (ii),
23 below. Further, all material designated as “HIGHLY CONFIDENTIAL - SOURCE CODE
24 INFORMATION” consistent with this Source Code Protective Order shall be subject to the
25 provisions of this Source Code Protective Order and shall be protected, used, handled, and
26 disposed of in accordance with the provisions of this Source Code Protective Order.

27 Each Party or non-party that designates information or items for protection under this
28 Source Code Protective Order must take care to limit any such designation to specific material

1 that qualifies under the appropriate standards set forth herein. A Designating Party must take care
2 to designate for protection only those materials, documents, items, or oral or written
3 communications that so qualify.

4 6.2 Manner and Timing of Designations: Except as otherwise provided in this Source
5 Code Protective Order or as otherwise stipulated or ordered, material that qualifies for protection
6 under this Source Code Protective Order must be clearly so designated before the material is
7 disclosed or produced. Designation in conformity with this Source Code Protective Order requires:

8 (i) For Information in Documentary Form (apart from transcripts of depositions or
9 other pretrial proceedings): That the Producing Party affix the legend “HIGHLY
10 CONFIDENTIAL - SOURCE CODE INFORMATION” on each page that
11 reflects, in whole or in part, Source Code. Where it is not possible to affix a
12 legend to particular materials that reflect, in whole in part, Source Code, the
13 Producing Party shall take reasonable steps to give all Receiving Parties notice of
14 the materials’ designation as “HIGHLY CONFIDENTIAL - SOURCE CODE
15 INFORMATION.” A Party or non-party that makes materials that reflect, in whole
16 in part, Source Code available for inspection need not designate them for protection
17 until after the inspecting Party has indicated which material it would like copied
18 and/or produced. During the inspection and before the designation, all of the material
19 made available for inspection shall be deemed “HIGHLY CONFIDENTIAL -
20 SOURCE CODE INFORMATION.” After the inspecting Party has identified the
21 documents it wants copied and/or produced, the Producing Party must determine
22 which documents qualify for protection under this Source Code Protective Order.
23 Then, before producing the specified documents, the Producing Party must affix the
24 “HIGHLY CONFIDENTIAL - SOURCE CODE INFORMATION” legend on
25 each page that reflects, in whole in part, Source Code, except that multi-page
26 documents may be designated in accordance with this paragraph.

27 (ii) For Testimony Given in Deposition or in Other Pretrial Proceedings: Subject to
28 the conditions set forth in Section 9.3(xiv) below, any party offering or sponsoring

1 the testimony may identify on the record, before the close of the deposition,
2 hearing or other proceeding, all protected testimony and may further specify any
3 portions of the testimony that qualify as “HIGHLY CONFIDENTIAL - SOURCE
4 CODE INFORMATION.” Alternatively, within thirty (30) days of receipt of a
5 transcript or recording of a deposition or other pretrial proceeding, the offering or
6 sponsoring Party or non-party may designate such transcript or recording or any
7 portion thereof as “HIGHLY CONFIDENTIAL - SOURCE CODE
8 INFORMATION” by notifying all Parties, in writing, of the specific pages and
9 lines of the transcript or recording that should be treated as “HIGHLY
10 CONFIDENTIAL - SOURCE CODE INFORMATION.” All transcripts or
11 recordings of depositions or other pretrial proceedings discussing, concerning, or
12 relating to Source Code shall be treated as “HIGHLY CONFIDENTIAL -
13 SOURCE CODE INFORMATION” for thirty (30) days after the receipt of the
14 transcript or recording, or until written notice of a designation is received,
15 whichever occurs first. In the case of a non-party witness, testimony can be
16 designated as containing “HIGHLY CONFIDENTIAL - SOURCE CODE
17 INFORMATION” by a Party, the non-party witness, or upon agreement of the
18 Parties.

19 In the event the deposition is videotaped, the original and all copies of the
20 videotape shall be marked by the video technician to indicate that the contents of the
21 videotape are subject to this Source Code Protective Order, substantially along the
22 lines of “This videotape reflects highly proprietary and confidential source code
23 information used in this case and is not to be viewed or the contents thereof to be
24 displayed or revealed except pursuant to the terms of the operative Source Code
25 Protective Order in this matter or pursuant to written stipulation of the parties.”

26 Counsel for any Producing Party shall have the right to exclude from oral
27 depositions, other than the deponent, deponent’s counsel, the reporter and
28 videographer (if any), any person who is not authorized by this Source Code

1 Protective Order to receive or access materials reflecting, in whole or in part, Source
2 Code, based on the designation of such materials. Such right of exclusion shall be
3 applicable only during periods of examination or testimony regarding such materials
4 reflecting, in whole or in part, Source Code.

5 (iii) For Information Produced in a Form Other than Documentary, and for Any Other
6 Tangible Items: The Producing Party shall affix in a prominent place on the exterior
7 of the container or containers in which the information or item is stored the legend
8 “HIGHLY CONFIDENTIAL - SOURCE CODE INFORMATION.”

9 (iv) For Inspection of Things or Premises reflecting Source Code: For inspection of things
10 or premises reflecting Source Code, governed by the provisions outlined in Section 9
11 below, the Producing Party shall state in writing prior to the inspection that “HIGHLY
12 CONFIDENTIAL - SOURCE CODE INFORMATION” will be revealed.

13 6.3 Inadvertent Failures to Designate and Redesignation: A Producing Party that
14 inadvertently fails to designate Disclosure or Discovery Material as “HIGHLY
15 CONFIDENTIAL - SOURCE CODE INFORMATION” pursuant to this Source Code
16 Protective Order at the time of its production shall be able to make a correction to its
17 designation. Such failure shall be corrected by providing to the Receiving Party
18 written notice of the error and substituted copies of the inadvertently produced
19 materials. Any party receiving such inadvertently unmarked Disclosure or Discovery
20 Materials shall, within five (5) days of receipt of the substitute copies, destroy or
21 return to the law firm representing the Producing Party all copies of such mis-
22 designated documents. The Producing Party shall comply with Paragraph 6.2 when
23 redesignating Disclosure or Discovery Material as “HIGHLY CONFIDENTIAL -
24 SOURCE CODE INFORMATION.” Following any redesignation of Disclosure or
25 Discovery Material as “HIGHLY CONFIDENTIAL - SOURCE CODE
26 INFORMATION,” the Party receiving such material shall take reasonable steps to
27 comply with the redesignation, including, without limitation, retrieving all copies and
28 excerpts of any redesignated material from persons not entitled to receive it as re-

1 designated.

2 A Receiving Party shall not be in breach of this Source Code Protective Order
3 for any use of such inadvertently-non-designated or inadvertently-mis-designated
4 material before the Receiving Party receives notice of the inadvertent failure to
5 designate, unless an objectively reasonable person would have realized that the
6 material should have been appropriately designated with a “HIGHLY
7 CONFIDENTIAL - SOURCE CODE INFORMATION” designation under this
8 Source Code Protective Order. Once a Receiving Party has received notice of the
9 inadvertent failure to designate pursuant to this provision, the Receiving Party shall
10 treat such material at the appropriately designated level pursuant to the terms of this
11 Source Code Protective Order.

12 6.4 Challenging Source Code Designations: Parties wishing to challenge materials
13 designated as “HIGHLY CONFIDENTIAL - SOURCE CODE INFORMATION” may do so
14 pursuant to the provisions outlined in the first paragraph of Section 7 of the Stipulated Protective
15 Order entered in this Action (Dkt. No. 61).

16 The burden of persuasion in any challenge to a “HIGHLY CONFIDENTIAL - SOURCE
17 CODE INFORMATION” designation shall be on the Designating Party. Nothing in this Source
18 Code Protective Order shall preclude or prejudice either party from arguing for or against any
19 such designation, establishing any presumption that a particular designation is valid, or altering
20 the burden of proof that would otherwise apply in a dispute over discovery or disclosure of
21 information. Until any such challenge is resolved, all parties shall continue to afford the material
22 in question the level of protection to which it is entitled under the Designating Party’s
23 designation.

24 **7. DISCLOSURE OF DISCOVERY MATERIALS REFLECTING SOURCE**
25 **CODE**

26 7.1 Unless otherwise ordered by the Court, materials reflecting Source Code, in whole
27 or in part, including those designated as “HIGHLY CONFIDENTIAL - SOURCE CODE
28 INFORMATION,” shall be subject to the provisions set forth in Sections 8 and 9 below, and may

1 be disclosed, subject to Sections 8 and 9 below, solely to:

2 (i) The Receiving Party's Outside Counsel, provided that such Outside Counsel is not
3 involved in competitive decision-making, as defined by *U.S. Steel v. United States*,
4 730 F.2d 1465, 1468 n.3 (Fed. Cir. 1984), on behalf of a Party or a competitor of a
5 Party (including those on Apple's Restricted Competitor List), and such Outside
6 Counsel's immediate paralegals and staff, and any copying or clerical litigation
7 support services working at the direction of such counsel, paralegals, and staff;

8 (ii) Outside experts or consultants retained by the Receiving Party to assist in this
9 Action, including his or her clerical and support staff (provided, however, that any
10 support staff that provides professional technical, engineering, accounting, or
11 financial support services shall not be included and must be separately disclosed).
12 Any disclosure to such outside experts or consultants retained by the Receiving
13 Party shall only be to the extent necessary to assist in this Action, and provided
14 that:

15 (a) Such expert or consultant has agreed to be bound by the provisions of the
16 Source Code Protective Order by signing a copy of Exhibit A, as described
17 below in Paragraph 7.3;

18 (b) Such expert or consultant is not a current officer, director, or employee of a
19 Party or of a competitor of a Party (including those listed on Apple's
20 Restricted Competitor List), nor anticipated at the time of retention to
21 become an officer, director or employee of a Party or of a competitor of a
22 Party (including those listed on Apple's Restricted Competitor List);

23 (c) Such expert or consultant is not involved in competitive decision-making,
24 as defined by *U.S. Steel v. United States*, 730 F.2d 1465, 1468 n.3 (Fed.
25 Cir. 1984), on behalf of a Party or a competitor of a Party (including those
26 listed on Apple's Restricted Competitor List);

27 (d) Such expert or consultant has (1) been identified as an expert whose
28 opinions may be presented at trial, or (2) is retained or specially employed

1 in anticipation of litigation or preparation of trial and who is not expected
2 to be called as a witness at trial; and

3 (e) No unresolved objections to such disclosure exist after proper notice has
4 been given to all Parties as set forth in Section 8 below.

5 (iii) Court reporters, stenographers and videographers retained to record testimony
6 taken in this Action;

7 (iv) The Court, jury, and court personnel;

8 (v) Any mediator who is assigned to hear this matter, and his or her staff, subject to
9 their agreement to maintain confidentiality to the same degree as required by this
10 Source Code Protective Order; and

11 (vi) Any other person with the prior written consent of the Producing Party or by order
12 of this Court.

13 7.2 Patent Prosecution Bar: Absent the written consent of the Producing Party, any
14 person on behalf of the Plaintiff who receives one or more items reflecting, in whole or in part,
15 Source Code, including those designated “HIGHLY CONFIDENTIAL - SOURCE CODE
16 INFORMATION,” by Defendant shall not be involved, directly or indirectly, in any of the
17 following activities: (i) advising on, consulting on, preparing, prosecuting, drafting, editing,
18 and/or amending of patent applications, specifications, claims, and/or responses to office actions,
19 or otherwise affecting the scope of claims in patents or patent applications relating to the
20 functionality, operation, and design of any technology reflected in or reasonably related to the
21 subject matter of Source Code materials, before any foreign or domestic agency, including the
22 United States Patent and Trademark Office; and (ii) the acquisition of patents (including patent
23 applications), or the rights to any such patents or patent applications with the right to sublicense,
24 relating to the functionality, operation, and design of any technology reflected in or reasonably
25 related to the subject matter of Source Code materials. These prohibitions shall begin when
26 access to Source Code materials are first received by the affected individual, and shall end two (2)
27 years after the final resolution of this Action, including all appeals.

28 7.3 Before any information or item designated “HIGHLY CONFIDENTIAL -

1 SOURCE CODE INFORMATION,” or substance or summary thereof, shall be disclosed to the
2 persons or identified in Section 7.1 above, the Parties are hereby ordered to tender a copy of this
3 Source Code Protective Order to each such person and witness in order that each such entity or person
4 to whom such disclosure of material reflecting Source Code, in whole or in part, including those
5 designated “HIGHLY CONFIDENTIAL - SOURCE CODE INFORMATION,” information or
6 item is made shall be on notice and fully informed that the existence and substance of the Source
7 Code Protective Order is, and is intended to be, equally binding upon it, him or her. Before any
8 information or item designated “HIGHLY CONFIDENTIAL - SOURCE CODE
9 INFORMATION,” or substance or summary thereof, is disclosed to any such person, each such
10 person shall sign and abide by the terms of the General Acknowledgment of Confidentiality and
11 Agreement to Be Bound by Source Code Protective Order, attached hereto as Exhibit A. The person
12 to whom the materials reflecting Source Code, in whole or in part, including those designated
13 “HIGHLY CONFIDENTIAL - SOURCE CODE INFORMATION,” are disclosed shall not give,
14 show, or otherwise divulge any of the information or item to any entity or person except as
15 specifically provided for by this Source Code Protective Order.

16 7.4 The Party’s Counsel who discloses materials reflecting Source Code, in whole or in
17 part, including those designated “HIGHLY CONFIDENTIAL - SOURCE CODE
18 INFORMATION,” shall be responsible for assuring compliance with the terms of this Source Code
19 Protective Order with respect to persons to whom materials reflecting Source Code are disclosed and
20 shall obtain and retain the originals of the General Acknowledgment of Confidentiality and
21 Agreement to Be Bound by Source Code Protective Order as signed by such persons.

22 **8. NOTICE OF DISCLOSURE AND OBJECTIONS TO PROPOSED**
23 **EXPERTS OR CONSULTANTS REVIEWING SOURCE CODE**

24 8.1 Prior to disclosing any documents, information, or things reflecting Source Code, in
25 whole or in part, including those designated “HIGHLY CONFIDENTIAL - SOURCE CODE
26 INFORMATION” to any expert or consultant as defined in Section 2.5 (“Person”), the Party
27 seeking to disclose such information shall provide the Producing Party with written notice that
28 includes: (i) the name of the Person; (ii) the present employer and title of the Person; (iii) an

1 identification of all of the Person's past and current professional or personal relationships with
2 any named plaintiff in the Action; (iv) an up-to-date curriculum vitae of the Person listing such
3 Person's education and experience; and (v) a list of the cases in which the Person has testified at
4 deposition or trial, all companies for which the individual has provided consulting services, either
5 directly or through a consulting firm, and all companies by which the individual has been
6 employed, within the last five (5) years. The Party seeking to disclose materials reflecting
7 Source Code, in whole or in part, including those designated "HIGHLY CONFIDENTIAL -
8 SOURCE CODE INFORMATION," shall provide such other information regarding the Person's
9 professional activities reasonably requested by the Producing Party for it to evaluate whether
10 good cause exists to object to the disclosure of such material to the Person. For purposes of this
11 section, "good cause" shall include an objectively reasonable concern that the Person will,
12 advertently or inadvertently, use or disclose Discovery Materials in a way or ways that are
13 inconsistent with the provisions contained in this Order. Any information provided pursuant to
14 this subsection, as appropriate, may itself be designated as material designated as "HIGHLY
15 CONFIDENTIAL - SOURCE CODE INFORMATION." During the pendency of this Action,
16 including all appeals, the Party seeking to disclose material designated as "HIGHLY
17 CONFIDENTIAL - SOURCE CODE INFORMATION" shall immediately provide written notice
18 of any change with respect to the Person's employment and consulting engagements.

19 8.2 A Party that makes a request and provides the information specified in the
20 preceding Paragraph 8.1 may disclose the materials reflecting Source Code, in whole or in part,
21 including those designated "HIGHLY CONFIDENTIAL - SOURCE CODE INFORMATION,"
22 to the identified Person unless, within ten (10) days of delivering the request, the Party receives a
23 written objection from the Designating Party. Any such objection must set forth in detail the
24 grounds on which it is based. In the absence of an objection before disclosure is permitted
25 pursuant to Paragraph 8.2 above, the Person shall be deemed approved under this Source Code
26 Protective Order.

27 8.3 If the Producing Party objects to disclosure, the Party shall deliver a written
28 objection, and the parties shall meet and confer via telephone or in person within five (5) business

1 days following the objection to attempt in good faith to resolve the dispute on an informal basis.
2 If the dispute is not resolved, the Party objecting to the disclosure will have twelve (12) days from
3 the date of the meet and confer to seek relief from the Court. If relief is not sought from the
4 Court within that time, the objection shall be deemed withdrawn. If relief is sought, designated
5 materials shall not be disclosed to the Person in question until the Court resolves the objection.

6 8.4 An initial failure to object to a Person under this Paragraph 8.3 shall not preclude
7 the nonobjecting Party from later objecting to continued access by that Person for good cause. If
8 an objection is made, the Parties shall meet and confer via telephone or in person within five (5)
9 days following the objection and attempt in good faith to resolve the dispute informally. If the
10 dispute is not resolved, the Party objecting to the disclosure will have seven (7) days from the
11 date of the meet and confer to seek relief from the Court. The designated Person may continue to
12 have access to information that was provided to such Person prior to the date of the objection. If
13 a later objection is made, no further Protected Material shall be disclosed to the Person until the
14 Court resolves the matter or the Producing Party withdraws its objection. Notwithstanding the
15 foregoing, if the Producing Party fails to move for a protective order within seven (7) business
16 days after the meet and confer, further Protected Material may thereafter be provided to the
17 Person.

18 **9. INSPECTION AND REVIEW OF SOURCE CODE**

19 9.1 Any Source Code that is produced by Plaintiffs shall be made available for
20 inspection in electronic format at the office of its outside counsel, Berman Devalerio, One
21 California Street, Suite 900, San Francisco, California 900, or any other location mutually agreed
22 by the Parties. Any Source Code that is produced by Apple Inc. will be made available for
23 inspection at the San Francisco office of its outside counsel, Morrison & Foerster LLP, 425
24 Market Street, San Francisco, California 94105, or any other location mutually agreed by the
25 Parties. Source Code will be made available for inspection between the hours of 9 a.m. and 5
26 p.m. on business days (i.e., weekdays that are not Federal holidays).

27 9.2 Prior to inspecting any Source Code requested after February 12, 2014, the
28 Receiving Party shall provide fourteen (14) days notice of the Source Code that it wishes to

1 inspect. With respect to Source Code requested prior to February 12, 2014, the Parties agree
2 adequate notice has been provided.

3 9.3 Source Code that is designated “HIGHLY CONFIDENTIAL - SOURCE CODE
4 INFORMATION” shall be produced for inspection and review subject to the following
5 provisions, unless otherwise agreed by the Producing Party:

6 (i) The Producing Party shall deliver one copy of the source
7 code files to the designated facility for review on the Source Code
8 Computer, as that term is defined below. For purposes of clarity, the
9 Producing Party may provide the source code files in read-only form.

10 (ii) All Source Code shall be made available by the Producing
11 Party to the Receiving Party’s outside counsel and/or experts in a secure
12 room on a secured computer without Internet access or network access to
13 other computers and on which all access ports have been disabled (except
14 for one printer port), as mutually agreed to by the parties, and as necessary
15 and appropriate to prevent and protect against any unauthorized copying,
16 transmission, removal or other transfer of any Source Code outside or away
17 from the computer on which the Source Code is provided for inspection
18 (the “Source Code Computer” in the “Source Code Review Room”). The
19 Source Code Computer shall be produced, stored, and secured at the offices
20 of the Producing Party’s outside counsel or such other appropriately secure
21 facility. The Source Code Computer and/or external storage media used to
22 store the source code shall be password protected and, at the option of the
23 Producing Party, further protected using PGP encryption. The Source
24 Code Computer shall run a reasonably current version of a mutually agreed
25 upon operating system such as Apple OS X, Microsoft Windows, Linux, or
26 SunOS.

27 (iii) The Producing Party shall install tools that are sufficient for
28 viewing and searching the code produced, on the platform produced, if

1 such tools exist and are presently used in the ordinary course of the
2 Producing Party's business. The Receiving Party's outside counsel and/or
3 experts may request that commercially available software tools for viewing
4 and searching Source Code be installed on the secured computer, provided,
5 however, that (a) the Receiving Party possesses an appropriate license to
6 such software tools; (b) the Producing Party approves such software tools;
7 and (c) such other software tools are reasonably necessary for the
8 Receiving Party to perform its review of the Source Code consistent with
9 all of the protections herein. Specific tools may include, but are not limited
10 to, multi-file text search tools such as "grep," dtSearch, Understand for
11 Java, Understand for C, Visual Slick Edit, Source-Navigator, PowerGrep
12 and ExamDiffPro or similar programs. The Receiving Party must provide
13 the Producing Party with the CD or DVD containing such licensed
14 software tool(s) at least twenty-one (21) days in advance of the date upon
15 which the Receiving Party wishes to have the additional software tools
16 available for use on the Source Code Computer.

17 (iv) No recordable media or recordable devices, including
18 without limitation sound recorders, computers, cellular telephones,
19 peripheral equipment, cameras, CDs, DVDs, or drives of any kind, shall be
20 permitted into the Source Code Review Room.

21 (v) The Receiving Party's outside counsel and/or experts shall
22 be entitled to take notes relating to the Source Code but may not copy the
23 Source Code into the notes and may not take such notes electronically on
24 the Source Code Computer itself or any other computer.

25 (vi) The Producing Party may visually monitor the activities of
26 the Receiving Party's representatives during any Source Code review, but
27 only to ensure that no unauthorized electronic records of the Source Code
28 and no information concerning the Source Code are being created or

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transmitted in any way.

(vii) No copies of all or any portion of the Source Code may leave the room in which the Source Code is inspected except as otherwise provided herein. Further, no other written or electronic record of the Source Code is permitted except as otherwise provided herein. The Producing Party shall make available a laser printer with commercially reasonable printing speeds for on-site printing during inspection of the Source Code. The Receiving Party may print limited portions of the Source Code provided that such portions: (1) are relevant to the claims and defenses in the case and are reasonably necessary for such purpose, and (2) are necessary to prepare court filings or pleadings or other papers (including a testifying expert’s expert report). The Receiving Party shall not print Source Code in order to review blocks of Source Code elsewhere in the first instance, i.e., as an alternative to reviewing that Source Code electronically on the Source Code Computer, as the Parties acknowledge and agree that the purpose of the protections herein would be frustrated by printing portions of code for review and analysis elsewhere, and that printing is permitted only when necessary to prepare court filings or pleadings or other papers (including a testifying expert’s expert report). Any printed portion that consists of more than five (5) pages of continuous Source Code shall be presumed to constitute a “block” of Source Code printed for review elsewhere.

(viii) Upon printing any such portions of Source Code, the printed pages shall be collected by the Producing Party. The Producing Party shall Bates number, copy, and label “HIGHLY CONFIDENTIAL - SOURCE CODE INFORMATION” any pages printed by the Receiving Party. Within seven (7) days, the Producing Party shall either (i) provide one copy set of such pages to the Receiving Party or (ii) inform the Requesting Party

1 that it objects that the printed portions are excessive and/or not done for a
2 permitted purpose. If, after meeting and conferring, the Producing Party
3 and the Receiving Party cannot resolve the objection, the Receiving Party
4 shall be entitled to seek a Court resolution of whether the printed Source
5 Code in question is narrowly tailored and was printed for a permitted
6 purpose. The burden shall be on the Receiving Party to demonstrate that
7 such printed portions are no more than is reasonably necessary for a
8 permitted purpose and not merely printed for the purposes of review and
9 analysis elsewhere. The printed pages shall constitute part of the Source
10 Code produced by the Producing Party in this Action.

11 (ix) All persons who will review a Producing Party's Source
12 Code on behalf of a Receiving Party, including members of a Receiving
13 Party's outside law firm, shall be identified in writing to the Producing
14 Party at least five (5) days in advance of the first time that such person
15 reviews Source Code. All persons viewing Source Code shall sign on each
16 day they access the Source Code Computer a log, maintained by the
17 Receiving Party, that will include the names of persons who enter the
18 locked room to access the Source Code Computer and when they enter and
19 depart. The Producing Party shall be entitled to a copy of the log upon one
20 (1) day's advance notice to the Receiving Party. Proper identification of all
21 authorized persons shall be provided prior to any access to the secure room
22 or the computer containing Source Code. Proper identification requires
23 showing, at a minimum, a photo identification card sanctioned by the
24 government of any State of the United States or by the government of the
25 United States. Access to the secure room or the Source Code Computer
26 may be denied, at the discretion of the supplier, to any individual who fails
27 to provide proper identification.

28 (x) Unless otherwise agreed upon in advance by the Parties in

1 writing, following each day on which inspection is done under this Source
2 Code Protective Order, the Receiving Party's outside counsel and/or
3 experts shall remove all notes, documents, and all other materials from the
4 Source Code Review Room. The Producing Party shall not be responsible
5 for any items left in the room following each inspection session, and the
6 Receiving Party shall have no expectation of confidentiality for any items
7 left in the room following each inspection session without a prior
8 agreement to that effect.

9 (xi) Other than as provided above, the Receiving Party will not
10 copy, remove, or otherwise transfer any Source Code from the Source
11 Code Computer including, without limitation, copying, removing, or
12 transferring the Source Code onto any recordable media or recordable
13 device. The Receiving Party will not transmit any Source Code in any way
14 from the Producing Party's facilities or the offices of its outside counsel of
15 record.

16 (xii) The Receiving Party's outside counsel of record may make
17 no more than three (3) additional paper copies of any portions of the
18 Source Code received from a Producing Party pursuant to Paragraph
19 9.3(vii), not including copies attached to court filings or used at
20 depositions, and shall maintain a log of all paper copies of the Source
21 Code. The log shall include the names of the reviewers and/or recipients of
22 paper copies and locations where the paper copies are stored. Upon one (1)
23 day's advance notice to the Receiving Party by the Producing Party, the
24 Receiving Party shall provide a copy of this log to the Producing Party.

25 (xiii) The Receiving Party's outside counsel of record and any
26 person receiving a copy of any materials reflecting Source Code shall
27 maintain and store any paper copies of the materials reflecting Source Code
28 at their offices in a manner that prevents duplication of or unauthorized

1 access to the materials reflecting Source Code, including, without
2 limitation, storing the materials reflecting Source Code in a locked room or
3 cabinet at all times when it is not in use. No more than a total of three (3)
4 individuals identified by the Receiving Party shall have access to the
5 printed portions of Apple Source Code (except insofar as such code
6 appears in any court filing or expert report).

7 (xiv) For depositions, the Receiving Party shall not bring copies
8 of any printed materials reflecting Source Code. Rather, at least three (3)
9 days before the date of the deposition, the Receiving Party shall notify the
10 Producing Party about the specific portions of Source Code it wishes to use
11 at the deposition, and the Producing Party shall bring printed copies of
12 those portions to the deposition for use by the Receiving Party. Copies of
13 materials reflecting Source Code that are marked as deposition exhibits
14 shall not be provided to the Court Reporter or attached to deposition
15 transcripts; rather, the deposition record will identify the exhibit by its
16 production numbers. All paper copies of materials reflecting Source Code
17 brought to the deposition shall remain with the Producing Counsel's
18 outside counsel for secure destruction in a timely manner following the
19 deposition.

20 (xv) Except as provided in this sub-paragraph, absent express
21 written permission from the Producing Party, the Receiving Party may not
22 create electronic images, or any other images, or make electronic copies, of
23 the Source Code from any paper copy of Source Code for use in any
24 manner (including by way of example only, the Receiving Party may not
25 scan the Source Code to a PDF or photograph the code). Images or copies
26 of Source Code shall not be included in correspondence between the
27 Parties (references to production numbers shall be used instead), and shall
28 be omitted from pleadings and other papers whenever possible. If a Party

1 reasonably believes that it needs to submit a portion of Source Code as part
2 of a filing with the Court, it shall do so in accordance with Section 12 of
3 this Source Code Protective Order. . If a Producing Party agrees to
4 produce an electronic copy of all or any portion of its Source Code or
5 provide written permission to the Receiving Party that an electronic or any
6 other copy needs to be made for a Court filing, access to the Receiving
7 Party's submission, communication, and/or disclosure of electronic files or
8 other materials reflecting any portion of Source Code (paper or electronic)
9 shall at all times be limited solely to individuals who are expressly
10 authorized to view Source Code under the provisions of this Order. Where
11 the Producing Party has provided the express written permission required
12 under this provision for a Receiving Party to create electronic copies of
13 Source Code, the Receiving Party shall maintain a log of all such electronic
14 copies of any portion of Source Code in its possession or in the possession
15 of its retained consultants, including the names of the reviewers and/or
16 recipients of any such electronic copies, and the locations and manner in
17 which the electronic copies are stored. Additionally, any such electronic
18 copies must be labeled "HIGHLY CONFIDENTIAL - SOURCE CODE
19 INFORMATION" as provided for in this Order.

20 **10. SOURCE CODE MATERIALS SUBPOENAED OR PRODUCED IN**
21 **OTHER LITIGATION**

22 If a Receiving Party is served with a subpoena or an order issued in other litigation that would
23 compel disclosure of any materials reflecting Source Code, in whole or in part, including those
24 designated "HIGHLY CONFIDENTIAL - SOURCE CODE INFORMATION," the Receiving
25 Party must so notify the Designating Party in writing (by fax or email, if possible) immediately and in
26 no event more than seven court days after receiving the subpoena or order. Such notification must
27 include a copy of the subpoena or Court order. The Receiving Party must also immediately inform in
28 writing the party who caused the subpoena or order to issue in the other litigation that some or all of

1 the material covered by the subpoena or order is the subject of this Source Code Protective Order. In
2 addition, the Receiving Party must deliver a copy of this Source Code Protective Order promptly to
3 the party in the other Action that caused the subpoena or order to issue. The Receiving Party must
4 also cooperate with respect to all reasonable procedures sought to be pursued by the Designating
5 Party whose materials reflecting Source Code may be affected.

6 The purpose of imposing these duties is to alert the interested parties to the existence of this
7 Source Code Protective Order and to afford the Designating Party in this case an opportunity to try to
8 protect its confidentiality interests in the court from which the subpoena or order issued. The
9 Designating Party shall bear the burden and expense of seeking protection in that court of its materials
10 reflecting Source Code.

11 **11. UNAUTHORIZED DISCLOSURE OF SOURCE CODE MATERIAL**

12 If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed materials
13 reflecting Source Code to any person or in any circumstance not authorized under this Source Code
14 Protective Order, the Receiving Party must immediately: (a) notify the Designating Party in writing of
15 the unauthorized disclosure (by fax or email) immediately and in no event more than two court days
16 after learning of the disclosure; (b) use its best efforts to retrieve all copies of the materials reflecting
17 Source Code; (c) inform the person or persons to whom unauthorized disclosures were made of all the
18 terms of this Source Code Protective Order; and (d) request such person or persons to execute the
19 “General Acknowledgment of Confidentiality and Agreement to Be Bound by Source Code Protective
20 Order” (Exhibit A).

21 Unauthorized or inadvertent disclosure does not change the status of Discovery Material or
22 waive the right to hold the disclosed document or information as “HIGHLY CONFIDENTIAL -
23 SOURCE CODE INFORMATION.”

24 **12. FILING SOURCE CODE MATERIAL**

25 Without written permission from the Designating Party or a Court order secured after
26 appropriate notice to all interested persons, a Party may not file any materials reflecting Source Code
27 in the public record in this Action. A Party that seeks to file under seal any materials reflecting
28 Source Code must comply with Civil Local Rule 79-5 and General Order 62. A Party who seeks to

1 introduce materials reflecting Source Code at a hearing, pretrial or other proceeding shall advise the
2 Court at the time of introduction that the information sought to be introduced is protected. If the Party
3 who designated the information as materials reflecting Source Code requests the protection be
4 continued, the Court will review the information to determine if the information is entitled to
5 continued protection. Prior to disclosure of materials reflecting Source Code at a hearing, the
6 Producing Party may seek further protections against public disclosure from the Court.

7 **13. FINAL DISPOSITION**

8 Unless otherwise ordered or agreed in writing by the Producing Party, within 90 days after
9 the final termination of this Action and upon receiving a written request to do so from the
10 Producing Party or Designating Party, each Receiving Party will certify that: (a) all printed
11 copies of source code have been returned, with the exception of exhibits that were attached to
12 filed pleadings or admitted into evidence; (b) any electronic storage or memory media which may
13 reflect Source Code have been returned, fully reformatted, and/or destroyed; and (c) any access
14 logs maintained by counsel have been archived along with counsel's other records from this
15 litigation. Other than set forth in this subparagraph, counsel may not maintain a file copy of
16 Source Code material. As used in this order, "final termination" shall be deemed to be the later of
17 (1) dismissal of all claims and defenses in this Action, with or without prejudice, and (2) final
18 judgment herein after the completion and exhaustion of all appeals, rehearings, remands, trials, or
19 review of this Action, including the time limits for filing any motions or applications for
20 extension of time pursuant to applicable laws.

21 **14. MISCELLANEOUS**

22 14.1 **Right to Further Relief:** Nothing in this Source Code Protective Order abridges the
23 right of any person to seek its modification by the Court in the future.

24 14.2 **Right to Assert Other Objections:** By stipulating to the entry of this Source Code
25 Protective Order, no Party waives any right it would otherwise have to object to disclosing or
26 producing any information or item on any ground not addressed in this Source Code Protective Order.
27 Similarly, no Party waives any right to object on any ground to use in evidence of any of the material
28 covered by this Source Code Protective Order.

1 14.3 Computation of Time: The computation of any period of time prescribed or allowed
2 by this Order shall be governed by the provisions for computing time set forth in Federal Rule of Civil
3 Procedure 6.

4 14.4 Fact of Designation Not Admissible: The fact of designation, or failure to designate,
5 Disclosure or Discovery Materials as “HIGHLY CONFIDENTIAL - SOURCE CODE
6 INFORMATION” pursuant to this Source Code Protective Order shall not be admissible for any
7 purpose in a trial on the merits or at any other proceeding other than at a proceeding arising from or
8 related to this Source Code Protective Order.

9 14.5 The provisions of this Source Code Protective Order do not apply to any trial
10 proceedings in this Action. The Parties will separately request the Court to enter an Order governing
11 the handling of such materials at trial.

12 14.6 The Court shall retain jurisdiction to enforce the terms of this Source Code Protective
13 Order.

14 14.7 Nothing in this Source Code Protective Order shall alter the requirements for and
15 scope of expert discovery in accordance with Federal Rule of Civil Procedure 26, local rules, and case
16 law.

17 14.8 The procedures set forth in this Source Code Protective Order shall apply to
18 every action that is subject to this proceeding, whether filed in or transferred to this Court for so long
19 as such actions are pending.

20 Dated: February 14, 2014

BERMAN DEVALERIO

21
22 By: Anthony D. Phillips
23 Christopher T. Heffelfinger, Esq.
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Liaison Counsel for Plaintiffs

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Dated: February 14, 2014

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ECF ATTESTATION

I, Suzanna P. Brickman, am the ECF User whose ID and Password are being used to file this **AGREED PROTECTIVE ORDER REGARDING THE DISCLOSURE AND USE OF SOURCE CODE**. In compliance with Civil Local Rule 5.1, I hereby attest that Anthony Phillips concurred in this filing.

Dated: February 14, 2014

By: Suzanna P. Brickman
Suzanna P. Brickman

SO ORDERED.

Dated: February 18, 2014

By: 
The Honorable Judge Lucy H. Koh.

EXHIBIT A

**EXHIBIT A GENERAL ACKNOWLEDGMENT OF CONFIDENTIALITY
AND AGREEMENT TO BE BOUND BY SOURCE CODE PROTECTIVE ORDER**

I, _____, acknowledge and declare under penalty of perjury that I have received a copy of the Agreed Protective Order Regarding the Disclosure and Use of Source Code (“Source Code Protective Order”) entered in Robert Herskowitz v. Apple Inc. and Phoebe Juel v. Apple Inc., United States District Court, Northern District of California, San Jose Division, Civil Action Nos. 12-CV-02131-LHK and 12-CV-03124-LHK. Having read and understood the terms of the Source Code Protective Order, I agree to be bound by the terms of the Source Code Protective Order. I understand and acknowledge that failure to so comply could expose me to sanctions and punishment in the nature of contempt, and solemnly promise that I will not disclose in any manner any information or item that is subject to the Source Code Protective Order to any person or entity except in strict compliance with the provisions of the Source Code Protective 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 the Source Code Protective Order even if such enforcement proceedings occur after termination of this action.

Executed on _____ at _____

Signature: _____

Name of individual: _____

Present occupation/job description: _____

Name of Company or Firm: _____

Address: _____